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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JERRY TAYLOR and MARY TAYLOR,

Petitioners,

v.

QUALITY HYUNDAI, INC., BANK ONE MILWAUKEE, N.A., and BANK ONE CHICAGO, N.A.,

Respondents,

and

DAVITA M. SMITH,

Petitioner,

v.

DESI AUTO SALES, INC., and GUARDIAN NATIONAL ACCEPTANCE CORP.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the Seventh Circuit's opinion, under which Congress has forced sellers to print *false information* on consumer credit contracts, a permissible interpretation of the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*?

2. Did the Seventh Circuit misconstrue the standard for determining whether a violation is "apparent on the face" of a contract under 15 U.S.C. § 1641(a) of the Truth in Lending Act?

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PREVIOUS OPINIONS

The citations of the official reporters of the opinions and orders entered in this case, in reverse chronological order, are as follows:

The United States Court of Appeals for the Seventh Circuit denied petitioners' petition for rehearing. *Taylor v. Quality Hyundai*, Unreported (August 21, 1998). App. 13.

The United States Court of Appeals for the Seventh Circuit affirmed in part and reversed and remanded in part the decisions of the United States District Court for the Northern District of Illinois. *Taylor v. Quality Hyundai*, 150 F.3d 689 (7th Cir. 1998). App. 1.

The United States District Court for the Northern District of Illinois granted respondent Guardian's motion for clarification or amendment and dismissed remaining claims, creating a final and appealable order. *Smith v. DeSi Auto Sales, Inc.*, Unreported (Jan. 10, 1997). App. 24.

The United States District Court for the Northern District of Illinois granted respondent Guardian's motion to dismiss. *Smith v. DeSi Auto Sales, Inc.*, Unreported (Dec. 23, 1996). App. 21.

The United States District Court for the Northern District of Illinois granted all pending motions to dismiss. *Taylor v. Quality Hyundai*, 932 F.Supp. 218 (N.D. Ill. 1996). App. 14.

STATEMENT OF JURISDICTION

The Seventh Circuit affirmed in part and reversed and remanded in part the decisions of the District Court for the Northern District of Illinois dismissing petitioners' complaints in both *Taylor v. Quality Hyundai* and *Smith v. DeSi Auto Sales, Inc.* on July 20, 1998. App. 1. The petitioners timely filed a petition for rehearing on August 3, 1998, which was denied on August 21, 1998. Petitioners now timely seek a writ of certiorari. This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The Truth in Lending Act

15 U.S.C. § 1641: Liability of Assignees.

> (a) Prerequisites. Except as otherwise specifically provided in this title, any civil action for a violation of this title or proceeding under section 1607 of this title which may be brought against a creditor may be maintained against any assignee of such creditor only if the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement, except where the assignment was involuntary. For the purpose of this section, a violation apparent on the face of the disclosure statement includes, but is not limited to (1) a disclosure which can be determined to be incomplete or inaccurate from the face of the disclosure statement or other documents assigned, or (2) a disclosure which does not use the terms required to be used by this subchapter.

16 C.F.R. § 433.2: Preservation of consumers' claims and defenses, unfair or deceptive acts or practices.

> In connection with any sale or lease of goods or services to consumers, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice within the meaning of section 5 of that Act for a seller, directly or indirectly, to:
>
> > (a) Take or receive a consumer credit contract which fails to contain the following provision in at least ten point, bold face, type:
> >
> > **NOTICE**
> >
> > **ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.**

STATEMENT OF THE CASE

Petitioners Jerry Taylor and Mary Taylor bought a new car and an extended warranty from respondent Quality Hyundai, Inc. ("Quality Hyundai"). Petitioner Davita M. Smith bought a used car and an extended warranty from DeSi Auto Sales, Inc. ("DeSi") (now out of business and not a party to the appeal). The Taylors paid $1,395 for their extended warranty, and Ms. Smith paid $799 for hers. All petitioners financed the price of their cars and extended warranties. Quality Hyundai assigned the Taylors' contract to respondents Bank One

Chicago, N.A. and Bank One Milwaukee, N.A. ("Bank One"), and DeSi assigned Ms. Smith's contract to respondent Guardian National Acceptance Corp. ("Guardian").

Both Quality Hyundai and DeSi falsely represented on the face of the retail installment contracts that they paid the *entire price* of the petitioners' extended warranties to the warranty providers. In fact, Quality Hyundai and DeSi retained a significant portion of the price of the extended warranties as pure profit and paid only a *fraction* of the price to the warranty providers.

The petitioners challenged this practice as violative of the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.*, which requires *all* disclosures on retail installment contracts to be accurate. *Gibson v. Bob Watson Chevrolet-Geo*, 112 F.3d 283 (7th Cir. 1997). In addition, Ms. Smith alleged that the dealer systematically charged more for extended warranties to credit customers than it charged to cash customers. Such a practice violates the Truth in Lending Act because the extra markup for credit customers is a finance charge that must be disclosed as such. *Walker v. Wallace Auto Sales*, 155 F.3d 927 (7th Cir. 1998).

There is no question that the petitioners' claims state causes of action under the Truth in Lending Act against the car dealers. The question here is whether the petitioners can also hold the *assignees* liable for the TILA violations.

Both the Taylors' and Ms. Smith's contracts bore the following provision that is mandated by the Federal Trade Commission to appear on every consumer credit contract:

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO *ALL CLAIMS* AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF.

(Emphasis added). The Taylors and Ms. Smith thus both signed contracts that informed them that their claims were completely protected even *after* their contracts passed into new hands. Accordingly, they named the holders as defendants when they filed lawsuits for the TILA violations.

The United States District Court for the Northern District of Illinois dismissed the petitioners' claims against the holders, Bank One and Guardian, reasoning that the contractual language was trumped by a 1980 amendment to the Truth in Lending Act limiting holders' liability to violations that are "apparent on the face" of the contract. 15 U.S.C. § 1641(a). The District Court also reasoned that the violations in question were not apparent on the face of the contract.

The petitioners appealed to the United States Court of Appeals for the Seventh Circuit, which upheld the district court's reasoning on assignee liability. Under the Seventh Circuit's opinion, therefore, Congress has promulgated a statute that *forces parties to include false statements on private contracts.* Petitioners respectfully suggest that this result is impermissible and request that this Court issue a writ of certiorari to the Seventh Circuit.

ARGUMENT

I. UNDER THE SEVENTH CIRCUIT'S OPINION, CONGRESS HAS FORCED SELLERS TO PRINT FALSE INFORMATION ON CONSUMER RETAIL INSTALLMENT CONTRACTS.

Under the Seventh Circuit's opinion in this case, Congress has forced sellers to print false information on consumer retail installment contracts. Such a result is impermissible and cannot possibly be Congress' intent.

The Federal Trade Commission regulation known as the "Holder Rule" was enacted in 1975 and abrogates the common-law holder in due course rule. It *requires* that the following notice be printed in bold, capital letters on consumer retail installment contracts:

> **ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS *SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES* OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.**

16 C.F.R. § 433.2 (emphasis added). This notice is a term of the contract and the parties cannot waive it. Its effect is that holders are derivatively liable for *all* potential claims to the same extent that the original seller would be liable.

When consumers like the Taylors and Ms. Smith who seek to finance automobiles read their retail installment contracts before signing them, they read this notice, which unequivocally assures them that they can bring against the finance company *any and all* claims

that they could bring against the seller. No exceptions to the Holder Rule appear in the contractual language—every single consumer credit contract must contain the exact language quoted above, and every single consumer who finances a car is led to rely upon it. Assignees like Bank One and Guardian voluntarily accept liability of the seller by purchasing contracts containing this language.

In 1980, five years after the FTC Holder Rule was promulgated (and five years after every consumer credit contract began bearing the required notice), Congress amended the Truth in Lending Act to limit the *direct* (as opposed to derivative) liability of contract holders. The amended statute states:

> Except as otherwise specifically provided in this title, any civil action for a violation of this title or proceeding under section 1607 of this title which may be brought against a creditor may be maintained against any assignee of such creditor only if the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement, except where the assignment was involuntary. For the purpose of this section, a violation apparent on the face of the disclosure statement includes, but is not limited to (1) a disclosure which can be determined to be incomplete or inaccurate from the face of the disclosure statement or other documents assigned, or (2) a disclosure which does not use the terms required to be used by this subchapter.

15 U.S.C. § 1641(a).

In deciding how to read the contractual language and the TILA amendment together, the Seventh Circuit in-

correctly framed the question as a contest between the regulation and the statute and concluded, not surprisingly, that the statute "won":

> "Regulations cannot trump the plain language of statutes" . . . . We therefore reject plaintiffs' contract-based effort to side-step § 1641(a) . . . . [I]t is the responsibility of the agency instead to conform its rules to any pertinent new laws.

App. 7.

Petitioners believe that the question is not whether the FTC or Congress win—rather, they believe that Congress would not and could not have enacted such an amendment if it intended to contradict the provisions of millions of consumer credit contracts.

Congress, knowing that all consumer credit contracts must bear the FTC holder language stating that *all* claims can be maintained against the holder, did not intend to *silently and secretly* limit that contractual language to mean "all claims except certain Truth in Lending Act claims." The Seventh Circuit's opinion forces an absurd result: Congress itself is requiring sellers to draft contracts containing false statements. As the Seventh Circuit held in *Gibson*, that practice is illegal.

Petitioners believe that Congress allowed the FTC Holder Rule to stand because it *saw no conflict* with its substance. Neither Congress nor the FTC has seen fit to address the so-called conflict, further suggesting that none exists. The Holder Rule and § 1641 have coexisted for nearly two decades, and neither has been modified to explicitly exclude liability for TILA violations under the FTC Holder Rule. Reading such an exclusion into the plain, unambiguous language of the contract is not justified by contract law.

Petitioners believe that the FTC Holder Rule and the amended TILA provision involve different aspects of a claim against a holder. The FTC Holder Rule applies on its face to "any sale or lease of goods or services to consumers." 16 C.F.R. § 433.2. When the FTC adopted the Holder Rule in 1975, *see* Final Rule, 40 Fed. Reg. 53,506 (Nov. 18, 1975), TILA's assignee liability provision (then codified at 15 U.S.C. § 1614) had been in existence for several years, and the FTC is presumed to have been aware of it. When Congress simplified TILA in 1980, it did not include any language in § 1641 that exempts assignees from the Federal Trade Commission's regulations. *See* Pub. L. 96-221, 94 Stat. 182 (1980). The FTC has not recognized any exemption for assignees in reviews of the Holder Rule in the 17 years since passage of § 1641(a), despite opportunity for public comment. *See, e.g.*, Regulatory Flexibility Act Review of the Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 57 Fed. Reg. 28,814 (Jun. 29, 1992).

The FTC Holder Rule and § 1641(a) operate differently. The Holder Rule cannot be said to render § 1641(a) superfluous even in transactions to which both apply. Section 1641 extends full liability for TILA violations to the assignee when the terms of § 1641 are satisfied. However, by the terms of the Holder Rule, recovery is limited to "amounts paid by the debtor." Because claims asserted under the Holder Rule are limited to the amounts that may be recovered against the seller, TILA's limitations on statutory damages ($500,000 or 1% of net worth in a class action, whichever is less, 15 U.S.C. § 1640) are measured against the seller's assets, which are ordinarily substantially smaller than the lender's.

The Holder Rule limits any award to the amount actually paid by the consumer on the contract, further limiting an assignee's liability. The Holder Rule thus ensures only that the purchaser's TILA claim against the dealer will be paid; that is the precise purpose of the Holder Rule. *See* Final Rule, 40 Fed. Reg. 53,506. It does not subject the finance company to the full range of statutory penalties based on its net worth. On the other hand, § 1641(a) concerns direct liability of the assignee without regard to procedural and damages limitations relevant only to the seller.

Numerous transactions are subject to § 1641(a) but *not* the Holder Rule. The Holder Rule requires that a seller of goods either assign paper to the finance company or refer the consumer to the finance company. In many consumer transactions, like home mortgages, there is no assignment or referral by a seller of goods. Where such loans are assigned, § 1641(a) furnishes the exclusive ground for liability.

The entire purpose of the Truth in Lending Act is to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. § 1601(a). Consumer credit contracts *must* provide accurate information. Under the Seventh Circuit's opinion, each consumer credit contract will now include a false statement, prominently featured in bold, capital letters.

II. THE SEVENTH CIRCUIT MISCONSTRUED THE STANDARD FOR DETERMINING WHETHER A VIOLATION IS "APPARENT ON THE FACE" OF A CONTRACT.

The Seventh Circuit fabricated its own standard for determining whether a violation is "apparent on the face" of the contract:

> We hold that § 1641(a) does not impose a duty of additional inquiry on assignees. Only violations that a reasonable person can spot on the face of the disclosure statement or other assigned documents will make the assignee liable under the TILA.

App. 9. Presumably, the kinds of "violations" that would be apparent under the newly-born "reasonable person" test are arithmetic errors and oversights, like the failure to fill out all the disclosure boxes. Assignees now have no liability for patently false information that they know is false.

The Seventh Circuit has thus extracted the teeth from assignee liability. Any holder can now claim that it had no reason to know that a contract's TILA disclosures were false. The Seventh Circuit's approach contravenes the legislative history of § 1641(a), which notes:

> [V]iolations are apparent on the face of the disclosure statement when disclosures are inaccurate or incomplete based on the statement or other documents involved and where incorrect terminology is used.

S. Rep. No. 96-73, 96th Cong., 2d Sess. 1980 at 296, *reprinted in* 1980 U.S.C.C.A.N. 236, 296.

Petitioners alleged that the holders in this case, Bank One and Guardian, *knew* that the figures in the boxes

labeled "amounts paid to others" on petitioners' contracts were false. For example, Ms. Smith's complaint alleges that Guardian had actual knowledge that a large percentage of the $799 was retained by the dealer as profit. App. 55-56. The Seventh Circuit ignored these allegations, creating instead an amorphous "reasonable person" standard that is certainly nowhere to be found in the language of the Truth in Lending Act.

CONCLUSION

For all the reasons stated above, petitioners respectfully request that the Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Dated: November 19, 1998

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-3658

JERRY and MARY TAYLOR, *et al.*,

Plaintiffs-Appellants,

v.

QUALITY HYUNDAI, INC., BANK ONE MILWAUKEE, N.A., and BANK ONE CHICAGO, N.A.,

Defendants-Appellees.

and

No. 97-1208

DAVITA M. SMITH, *et al.*,

Plaintiffs-Appellants,

v.

DESI AUTO SALES, INC., and GUARDIAN NATIONAL ACCEPTANCE CORP.,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 6619—**Charles R. Norgle, Sr.**, *Judge.*
No. 96 C 329—**James F. Holderman**, *Judge.*

ARGUED SEPTEMBER 22, 1997—DECIDED JULY 20, 1998

Before CUDAHY, KANNE, and DIANE P. WOOD, *Circuit Judges.*

DIANE P. WOOD, *Circuit Judge.* In *Gibson v. Bob Watson Chevrolet-Geo, Inc.*, 112 F.3d 283 (7th Cir. 1997), this court held that consumers stated a claim under the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601 *et seq.*, when they charged that automobile dealers had not disclosed their retention of a portion of extended warranty charges reported as "Amounts Paid to Others on Your Behalf." The two cases we have consolidated for opinion purposes, both of which were dismissed below, raise in part the same question, and in part the related question whether a dealer's assignee is liable for such alleged misrepresentations by the dealer. We conclude that *Gibson* controls the question of dealer liability, which is raised only in the appeal in *Taylor v. Quality Hyundai, Inc.*, No. 96-3658, and it requires us to remand that part of the case to the district court for further proceedings. As for the assignees, however, we agree with the district courts that Congress has precluded liability unless the violation is apparent on the face of the disclosure statement or other assigned documents, and that the relevant statements here do not meet that standard. We therefore affirm the decisions below on the question of assignee liability.

The facts in these cases are similar, both to each other and to the facts presented in *Gibson*. Jerry and Mary Taylor bought a new Hyundai Accent in July 1995, and they bought an extended warranty from the dealer, Quality Hyundai, at the same time. They signed a motor vehicle retail installment contract committing them to pay $12,081 for the car (minus a $900 down payment), and $1,395 for the extended warranty. In conjunction with the sale, Quality gave them a TILA disclosure form that included, under the now-familiar heading "Amounts Paid to Others for You," an entry reporting $1,395 paid to the warranty provider. After the sale, Quality assigned the entire installment contract to Bank One Chicago (although the contract signed by the Taylors designated Bank One Milwaukee as

the assignee). The story in Davita Smith's case is practically identical, except that she bought her car (a 1991 Mercury Cougar) from DeSi Auto Sales, her TILA form showed $799 "Paid to Others for You" for an extended warranty, and her installment contract was assigned to Guardian National Acceptance Corporation ("Guardian").

The Taylors and Smith alleged that the statements indicating that the extended warranty charges were "Amounts Paid to Others for You" were false, in that neither Quality nor DeSi paid the full amount to the warranty provider. In both cases the plaintiffs also alleged that the respective assignees of their installment contracts, Bank One and Guardian, were sophisticated players in the lending market who must have known that the statements on the TILA forms were false. They therefore sought damages under the TILA, 15 U.S.C. § 1641(a). Both district courts ruled for the assignees. In the Taylors' case, the district court also concluded that Quality was not liable under the statute. In Smith's case, the district court entered a default order against DeSi and stayed Smith's motion for class certification against it. DeSi is therefore not a party to this appeal, but Guardian is properly here because the district court certified the judgment in Guardian's favor under Federal Rule of Civil Procedure 54(b). See *United States v. Ettrick Wood Products, Inc.*, 916 F.2d 1211, 1217-18 (7th Cir. 1990).

1. *Liability of Quality Hyundai.* To the extent the Taylors are asserting TILA claims against Quality Hyundai for the allegedly misleading disclosures on the form, their suit is identical to the one considered in *Gibson*. *Gibson* holds that persons like the Taylors may state a claim under the TILA against a dealer who fills out a TILA form in a misleading fashion. 112 F.3d at 286-87.

There is one additional issue not governed by *Gibson*, which is whether the district court erred when it denied the Taylors' motion to amend their complaint to allege that Quality systematically charged a higher mark-up on extended warranties for credit customers than it did for cash

customers. On the one hand, all of the information necessary to support the proposed amendment was available to the plaintiffs long before their case was dismissed, and we normally review a district court's decisions under Federal Rule of Civil Procedure 15(a) deferentially. See *Helm v. Resolution Trust Corp.*, 84 F.3d 874, 879 (7th Cir. 1996) (abuse of discretion); *Tavarez v. O'Malley*, 826 F.2d 671, 678 (7th Cir. 1987) (same). On the other hand, this case will receive a fresh start when it returns to the district court for further proceedings consistent with our opinion in *Gibson*. Thus, while we are reluctant to find that the district court abused its discretion in refusing the amendment when it did, it may wish to reconsider this ruling if the plaintiffs renew their motion on remand, in light of the intervening *Gibson* decision and the unlikelihood of prejudice to the defendant.

2. *Liability of Guardian and Bank One.* In 1975, the Federal Trade Commission (FTC) issued a regulation requiring sellers to include the following words on consumer credit contracts:

> NOTICE
>
> ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

16 C.F.R. § 433.2(a) (1997). Relying on this "Holder Notice," the plaintiffs all argue that Guardian and Bank One, as holders of the consumer credit contracts in question, are vulnerable to the same TILA claims that the plaintiffs may raise against Quality and DeSi, the sellers of the extended warranties. Unfortunately for the plaintiffs, however, the FTC's regulation is not the last word on this subject.

In 1980, Congress amended the part of the TILA that deals with assignees to read as follows:

> (a) Except as otherwise specifically provided in this subchapter, any civil action for a violation of this subchapter . . . which may be brought against a creditor may be maintained against any assignee of such creditor only if the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement, except where the assignment was involuntary. For the purpose of this section, a violation apparent on the face of the disclosure statement includes, but is not limited to (1) a disclosure which can be determined to be incomplete or inaccurate from the face of the disclosure statement or other documents assigned, or (2) a disclosure which does not use the terms required to be used by this subchapter.

15 U.S.C. § 1641(a). Prior to this amendment, the statutory provisions that assured transfer of the forms containing the TILA disclosures to the assignee also made it possible for the debtor to claim that the assignee had "knowledge" of the violation. The amendment therefore narrowed considerably the potential scope of assignee liability. See H.R. Conf. Rep. No. 96-842, at 80-81 (1980), reprinted in 1980 U.S.C.C.A.N. 298, 310-11; S. Rep. No. 96-368, at 32-33 (1979), reprinted in 1980 U.S.C.C.A.N. 280, 296.

Guardian and Bank One argue that the unmistakable effect of the 1980 amendment is to trump the FTC's Holder Notice, under which they would have been subject to any claims and defenses that the debtors could have asserted against the original sellers. Although no court of appeals has yet decided this question, every district court to which it has been presented has agreed with their reading of the statute. See, *e.g.*, *Taylor v. Bob O'Connor Ford, Inc.*, 1998 WL 177689, at *9-11 (N.D. Ill. Apr. 13, 1998); *Brister v. All Star Chevrolet, Inc.*, 986 F. Supp. 1003, 1009-10 (E.D. La. 1997); *Kinzel v. Southview Chevrolet Co.*, 892 F. Supp. 1211, 1217 (D. Minn. 1995). See also Clontz, Truth-in-

Lending Manual ¶¶ 8.06[3][c], 10.09 (rev. ed. 1996). If the district courts are correct, then the only question left for us to decide is whether the violations in these cases were "apparent on the face of the disclosure statement," within the meaning of § 1641(a). But the plaintiffs have argued that we should reject this reading of the statute. We explain first why we think the lower courts properly understood the law, and then we discuss the statutory exception for "apparent" violations.

The plaintiffs initially argue that the TILA actually has nothing to do with the assignees' liability in these cases, because they are bound under the terms of the contracts they accepted, wholly apart from the statute. The retail installment contracts repeat the language of the FTC's Holder Notice (as they must, under 16 C.F.R. § 433.2), which announces that any holder of the contract is subject to claims and defenses that could be brought against the original seller. When Guardian and Bank One accepted the assignments, the plaintiffs reason, they voluntarily waived any right to rely on the statutory defense provided by § 1641(a). In our view, however, this misconstrues the effect of the Holder Notice insofar as it governs TILA-based claims. As a legally required part of every consumer financing contract, the Holder Notice continues to perform an important function even in the contracts between the plaintiffs and their respective assignees. If the cars they purchased turn out to be lemons and they assert a right to withhold payment against the sellers, they may also assert the same right against the assignees. See, *e.g.*, *Mount v. LaSalle Bank Lake View*, 926 F. Supp. 759, 763-64 (N.D. Ill. 1996); *Maberry v. Said*, 911 F. Supp. 1393, 1401-03 (D. Kan. 1995). But § 1641(a) has limited one set of claims that they may carry through to the assignee, namely, those based on a "violation of this subchapter [*i.e.* Title 15 U.S.C., ch. 41, subchapter 1]." The Holder Notice, even though contained within the contract, was not the subject of bargaining between the parties, and indeed could not have been. It is part of the contract by force of law, and it

must be read in light of other laws that modify its reach. See, *e.g.*, *Robbins v. Bentsen*, 41 F.3d 1195, 1198 (7th Cir. 1994) ("Regulations cannot trump the plain language of statutes . . ."); *Foster v. Celani*, 849 F.2d 91, 92 (2d Cir. 1988). *Cf. Morley-Murphy Co. v. Zenith Electronics Corp.*, 142 F.3d 373, 380-81 (7th Cir. 1998). We therefore reject the plaintiffs' contract-based effort to side-step § 1641(a).

Next, the plaintiffs argue that there really is no conflict between the Holder Notice and § 1641(a), apparently because Congress did not think to include language in the statute that *exempts* assignees from the FTC's regulations, and additionally because the FTC has not amended its rule since the passage of the 1980 amendment. Neither of these points is persuasive. There is no reason for Congress expressly to address regulatory language that will become (in part) superseded by subsequent legislation; it is the responsibility of the agency instead to conform its rules to any pertinent new laws. *Cf. United States v. Larionoff*, 431 U.S. 864, 873 & n.12 (1977). As for the lack of change in the rule, we have already noted that the Holder Notice continues to allow the debtor to raise many claims and defenses against the assignee that he or she may have against the original seller; § 1641(a) limits only certain TILA claims. Under the circumstances, the FTC may have seen no need to change its regulation.

Plaintiffs also argue that § 1641(a) limits only direct claims against the assignee that could be asserted without regard to the procedural and damages limitations that apply in actions against the seller. They refer here to 15 U.S.C. § 1640, which limits statutory damages in a class action to the lesser of 1% of the net worth of the defendant or $500,000. The problem with this argument is straightforward: nothing in § 1641 supports it. Section 1641 applies to "any civil action for a violation of this subchapter" (of which both § 1640 and § 1641 are a part), which surely encompasses actions that implicate the procedural and damages rules of § 1640.

Plaintiffs' last effort to avoid the effect of § 1641 concedes its applicability, but asserts that they qualify for the exception for violations that are "apparent on the face" of the disclosure statements. They argue that the apparentness (or lack thereof) of a violation should be ascertained in light of the knowledge that a reasonable assignee similarly situated to the defendants should have. Guardian and Bank One, as active participants in the financing market, know about common industry practices in this market. From that, plaintiffs argue that the assignees must have known that an extended warranty charge listed as an "Amount Paid to Others for You" on their TILA forms included an undisclosed commission imposed by the original creditors—ergo, the violation of the TILA was apparent on the face of the documents *to these assignees.*

The statute describes two ways in which an "apparent" violation can be detected: "(1) a disclosure which can be determined to be incomplete or inaccurate from the face of the disclosure statement or other documents assigned, or (2) a disclosure which does not use the terms required to be used by this subchapter." 15 U.S.C. § 1641(a). Plaintiffs are not arguing that the violations here were "apparent" based on the second of those possibilities. We therefore consider only the first.

Even though we do not assume that assignees approach their tasks with blank minds, we cannot agree that awareness of the practices of some creditors can be equated to knowledge that a particular disclosure on a particular TILA form is inaccurate or incomplete. These are good cases in point. Suppose that 75%, or even 90%, of all automobile dealers in the greater Chicago area engage in the practice about which the plaintiffs are complaining. That still does not mean that an employee of a bank or other financial institution could tell, simply by looking at the face of the documents assigned, whether the particular TILA statement before her was inaccurate or incomplete. One out of four, or one out of ten, might be perfectly accurate. In effect, the rule for which the plaintiffs are

arguing would impose a duty of inquiry on financial institutions that serve as assignees. Yet this is the very kind of duty that the statute precludes, by limiting the required inquiry to defects that can be ascertained from the face of the documents themselves. A useful analogy is the duty of banks to review documents presented under a letter of credit. Like an assignee bank reviewing a TILA statement, a bank reviewing a letter of credit is responsible for noticing facial irregularities, such as statements that are illegal, impossible, or in conflict with other terms. See, *e.g.*, *Instituto Nacional De Comercializacion Agricola (INDECA) v. Continental Illinois Nat'l Bank and Trust Co.*, 858 F.2d 1264, 1269-70 (7th Cir. 1988). But in neither instance does the bank have a duty to seek out additional information before it makes its own decision to accept the tender of the documents, or to accept the assignment with the protection afforded by § 1641(a). We hold that § 1641(a) does not impose a duty of additional inquiry on assignees. Only violations that a reasonable person can spot on the face of the disclosure statement or other assigned documents will make the assignee liable under the TILA. Since no such violation exists here, neither Guardian nor Bank One is liable to the plaintiffs.

Because we conclude that § 1641(a) by its terms bars the claims against the assignees, we have no need to address the additional arguments the defendants and their amicus have raised, including the suggestion that the plaintiffs are precluded from recovering against the assignees because they received what they bargained for: a car plus an extended warranty. This is merely the defendants' version of the untenable position that a regulation (the Holder Notice) trumps a statute (the TILA). See Bank One's Brief at 12-14 (arguing that limited remedies available under the Holder Notice control remedial scope of the TILA). The Taylors and Smith correctly argued that (a) they were told they paid $1,395 and $799 respectively for an extended warranty; (b) in fact only part of the money went to pay for the warranty; and (c) the difference between the amount

paid and the actual cost of the warranty inflated either the finance charge or the price of the vehicle. This is no different than if a TILA disclosure statement falsely reported that that the interest rate on a credit sale was 18% when it was really 25%. Even if the contracted-for goods or services were delivered under these conditions, that would not mean there was no TILA violation. See § 1641(a) ("*any* civil action for a violation of this subchapter . . . which may be brought against a creditor may be maintained against *any* assignee of such creditor [for a violation apparent on the face of a disclosure statement] . . .") (emphasis added); *Cowen v. Bank United of Texas*, 70 F.3d 937, 940-41 (7th Cir. 1995).

For the foregoing reasons, we AFFIRM the judgment in *Taylor v. Quality Hyundai, Inc.*, No. 96-3658, in favor of Bank One, and we REVERSE the judgment in that case for Quality Hyundai and REMAND for further proceedings. We AFFIRM the judgment in Guardian's favor in *Smith v. DeSi Auto Sales, Inc.*, No. 97-1208. Each party should bear its own costs in *Taylor*.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: July 20, 1998

BEFORE:

Honorable RICHARD D. CUDAHY, Circuit Judge
Honorable MICHAEL S. KANNE, Circuit Judge
Honorable DIANE P. WOOD, Circuit Judge

No. 96-3658

JERRY TAYLOR and MARY TAYLOR, et al.,

Plaintiffs-Appellants,

v.

QUALITY HYUNDAI, INCORPORATED, BANK ONE, MILWAUKEE, N.A. and BANK ONE, CHICAGO N.A.,

Defendants-Appellees.

and

No. 97-1208

DAVITA M. SMITH, et al.,

Plaintiffs-Appellants,

v.

DESI AUTO SALES, INCORPORATED and GUARDIAN NATIONAL ACCEPTANCE CORPORATION,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 6619, Charles R. Norgle, Sr., Judge.
No. 96 C 329, James F. Holderman, Judge.

The judgment of the District Court in Taylor v. Quality Hyundai, Inc., No. 96-3658, is AFFIRMED in favor of Bank One and REVERSED and REMANDED for further proceedings as to Quality Hyundai. Each party should bear its own costs in Taylor. The judgment of the District Court in Smith v. DeSi Auto Sales, Inc., No. 97-1208 is AFFIRMED, with costs, in Guardian's favor. The above is in accordance with the decision of this court entered on this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Decided August 21, 1998

Before

Hon. Richard D. Cudahy, Circuit Judge
Hon. Michael S. Kanne, Circuit Judge
Hon. Diane P. Wood, Circuit Judge

JERRY and MARY TAYLOR, et al., *Plaintiffs-Appellants,*	]	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
v.	]	
No. 96-3658	]	No.
QUALITY HYUNDAI, INC., BANK ONE MILWAUKEE, and BANK ONE CHICAGO, *Defendants-Appellees.*	]	**Charles R. Norgle, Sr.,** *Judge.*

ORDER

On consideration of the petition for rehearing filed by counsel for the plaintiffs-appellants on August 3, 1998, in the above matter, all members of the panel have voted to **DENY** the petition. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby **DENIED.**

App. 14

[Dated July 3, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JERRY TAYLOR and MARY TAYLOR on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	No. 95 C 6619
v.	)	
	)	Honorable
QUALITY HYUNDAI, INC., BANK ONE MILWAUKEE, N.A., and BANK ONE CHICAGO, N.A.,	)	Charles R. Norgle, Sr.
Defendants.	)	

OPINION AND ORDER

CHARLES R. NORGLE, SR., District Judge:

Before the court are the Motions to Dismiss of all Defendants. For the following reasons, the motions are granted.

I. *Background*

Jerry Taylor and Mary Taylor ("Taylors") filed their Complaint under the federal Truth in Lending Act ("TILA") (Count I) and the Illinois Consumer Fraud Act ("ICFA") (Counts II and III). The Complaint alleges that Quality Hyundai, Inc. ("Quality"), Bank One, Milwaukee, N.A. ("Bank One Milwaukee"), and Bank One, Chicago, N.A. ("Bank One Chicago") violated those statutes in connection with the financing of an automobile for the Taylors. The Taylors purchased the automobile under a retail installment sales contract ("Con-

tract"). Quality was the original creditor under the Contract. Bank One Milwaukee is an assignee of the Contract. Bank One Chicago is apparently the post office box to which the Taylors sent their payments.

The Taylors complain that the Contract improperly contained a section labeled "itemization of amount financed," which listed the purchase price of extended warranty coverage at $1,395. That listing appeared in the section entitled "[amounts] paid to others for [**3] you," and indicated that the $1,395 was paid to "Western Nat." The Taylors allege that this listing caused them to be overcharged for extended warranty coverage, because Quality did not pay the full $1,395 to Western Nat., but rather retained a portion of the charge. The Taylors do not allege that they did not receive meaningful disclosure of their credit terms, that the amount disclosed on the Contract was inaccurate, or that they were unable to compare the credit terms available to them. They also do not allege actual damages. Moving to dismiss, all Defendants argue that the Taylors have not stated causes of action under either TILA or the ICFA.

II. *Discussion*

On a motion to dismiss, a complaint must be sustained if relief could be granted under any set of facts consistent with the allegations. *National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 114 S. Ct. 798, 127 L. Ed. 2d 99 (1994) (citations omitted). In deciding the motion, the court must consider the allegations in the light most favorable to the plaintiff.

Count I alleges a violation of TILA. All Defendants argue that the Taylors have not stated a claim under TILA because Defendants have fully complied with TILA requirements.

Congress delegated [**4] to the Federal Reserve Board ("FRB") the power to elaborate and expand the legal framework of TILA. *See Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565, 63 L. Ed. 2d 22, 100 S. Ct. 790 (1980). The FRB exercised this authority by promulgating a set of regulations, known as "Regulation Z," which sets forth the manner in which disclosures must be made by creditors. To further TILA's goal of ensuring meaningful and understandable disclosures, Regulation Z specifically prohibits the inclusion of "information not directly related to the disclosures required under § 226.18." See 12 C.F.R. § 226.17(a)(1).

Recently, the FRB revised its Official Staff Interpretation to Regulation Z ("Interpretation").[1] *See* Interpretation, 12 C.F.R. § 226.18. Courts grant great deference to the FRB's interpretations of its own regulations, and those interpretations are dispositive unless clearly irrational. *Gibson v. Bob Watson Chevrolet-Geo, Inc.*, 1996 U.S. Dist. LEXIS 7961, No. 95 C 6661, 1996 WL 316975, at *2 (N.D. Ill. June 10, 1996) (finding no TILA violation in an automobile credit contract which listed extended warranty/service charge as an "other charge" paid "to North American for extended warranty," [**5]

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[1] The Interpretation applies retroactively, as it interprets and clarifies existing law. *See Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565, 63 L. Ed. 2d 22, 100 S. Ct. 790,-70 (1980); *Hernandez v. Vidmar Buick, Inc.*, 910 F. Supp. 422 (N.D. Ill. 1996).

and failed to disclose that dealership paid only a small portion of that charge to an outside provider).

The Interpretation states that the "itemization of amounts financed" must include "any amounts paid to other persons by the creditor on the consumer's behalf." 12 C.F.R. § 226.18. Further, the Interpretation provides that a creditor may either include the total charge of extended warranty coverage as an amount paid to others or alter the form contract to indicate that the dealer may retain a portion of the charge as profit. The Interpretation states:

> A sum is sometimes added to the amount of a fee charged to a consumer for a service provided by a third party (such as for an extended warranty or service contract) that is payable in the [**6] same amount in comparable cash and credit transactions. In the credit transaction, the amount is retained by the creditor. Given the flexibility permitted in meeting the requirements of the amount financed itemization (see the commentary to Section 226.18(c)), the creditor in such cases may reflect that the creditor has retained a portion of the amount paid to others. For example, the creditor could add to the category "amount paid to others" language such as "(we may be retaining a portion of this amount)."

12 C.F.R. 226.18(c)(iii)-2 (emphasis added). The language does not condemn the practice complained of by the Taylors. As written, the Contract was acceptable under TILA and its corresponding regulations; no action arises from the Contract's failure to disclose that Quality may have retained a portion of the charge. The FRB did not require creditors to alter their method of disclosure: the words "must" or "shall" do not appear in

the Interpretation. *See Abercrombie v. William Chevrolet/Geo Inc.*, 1996 U.S. Dist. LEXIS 6121, No. 95 C 3119, 1996 WL 251435, at *2 (N.D. Ill. May 8, 1996) (noting that "may" should not be confused with "must," nor "could" with "shall"). Had the FRB wanted to require [**7] disclosure of amounts retained by the creditor, it could have done so with stronger language. It did not. Accordingly, the Taylors cannot state a claim under TILA based on the alleged facts. See Gibson, 1996 U.S. Dist. LEXIS 7961, 1996 WL 316975 at *2.[2]

Count II alleges a violation of the ICFA based on the same contractual language at issue in the Count I. Count III alleges a claim under the ICFA which springs from a violation of Section 5 of the Illinois Motor Vehicle Retail Installment Sales Act ("MVRISA"). The Illinois Supreme Court determined that conduct authorized by TILA cannot constitute a violation of the ICFA. *Hernandez v. Vidmar Buick Co.*, 910 F. Supp. 422, 427 (N.D. [**8] Ill. 1996). *See also* 815 ILCS 505/10b, 815 ILCS 375/5(16). As the court has determined that the complained of conduct is acceptable under TILA, the court also dismisses Counts II and III.

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[2] The court recognizes that other courts in this district have disagreed with the holdings of this court and the other TILA cases cited herein. *See Alexander v. Continental Motor Werks*, 933 F. Supp. 715, 1996 U.S. Dist. LEXIS 10142 (N.D. Ill. 1996) (Kocoras, J.); *Bambilla v. Evanston Nissan, Inc.*, 1996 U.S. Dist. LEXIS 7029, No. 94 C 6818, 1996 WL 284954 (N.D. Ill. May 21, 1996) (Leinenweber, J.).

III. *Conclusion*

For the foregoing reasons, the Complaint is dismissed.

IT IS SO ORDERED.

ENTER:

/s/_____
CHARLES RONALD NORGLE, SR.
Judge United States District Court

DATED: 7-23-96

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

JUDGMENT IN A CIVIL CASE

JERRY TAYLOR and MARY TAYLOR

vs. Case Number: 95 C 6619

QUALITY HYUNDAI, INC, BANK ONE MILWAUKEE, N.A., and BANK ONE CHICAGO, N.A.

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to a hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendants' motions to dismiss are granted and the complaint is dismissed.

July 23, 1996
Date

H. Stuart Cunningham
Clerk

/s/
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge	James F. Holderman
Case Number	96 C 329
Case Title	Smith v. DeSi, et al
Date	Dec. 23, 1996

Other docket entry: Defendant DeSi's motion to dismiss and to stay is denied. Defendant Guardian's motion to dismiss is granted. Plaintiff's motion for class certification is denied in part and stayed in part. Plaintiff is granted to 1/13/97 to file an amended complaint with the counts properly numbered. Status hearing is set for 1/28/97 at 10:00 am.

ORDER:

Defendant DeSi Auto Sales has moved to dismiss plaintiff's complaint and to stay discovery and class action certification. Defendant Guardian National has moved to dismiss the claims against it in counts I, II, III, IV, VII and VIII [TILA] of plaintiff's complaint (plaintiff has no count VI but two counts numbered VIII, of which Guardian has moved to dismiss the second). Lastly, plaintiff Davita Smith has moved for class certification for counts I, II, III, and IV of the complaint. For the following reasons, DeSi's motions are denied as moot, Guardian's motion is granted, and plaintiff's motion is denied in part and stayed in part.

On August 9, 1996, this court entered an order of default against DeSi. As a result, all of DeSi's motions are denied as moot.

In support of its motion to dismiss, Guardian cites *Lindsey v. Ed Johnson Oldsmobile*, 1996 WL 529417 (N.D.Ill.). In *Lindsey*, a case also involving plaintiff's counsel, the court granted a motion to dismiss that involved counts almost identical to counts I, II, III, IV and VII at issue in Guardian's motion. This court will follow the *Lindsey* opinion and grant Guardian's motion to dismiss those counts for the reasons set forth in *Lindsey*. See also *McPhan v. George R. Gibson Chevrolet, Inc.*, 1996 WL 685449 (N.D.Ill.) (followed *Lindsey* to dismiss claims against assignees). As to the Truth in Lending Act claim in Count VIII, plaintiff has not alleged that Guardian could have determined that DeSi inaccurately stated plaintiff's down payment. Because section 1641(a) of the TILA—15 U.S.C. § 1641(a)—makes a creditor liable only if a violation is apparent on the face of the disclosure statement, count VIII (number two) must also be dismissed as to Guardian. See *Lindsey*.

Plaintiff has moved for class certification against both Guardian and DeSi. The motion for certification against Guardian is denied as moot because Guardian has been dismissed from the counts at issue for certification. Plaintiff's motion for class certification against DeSi is stayed so that plaintiff can inform the court at the next status hearing regarding proceeding with class action allegations solely against a defaulted party. Plaintiff is also granted leave and ordered to file an amended complaint with the counts properly numbered.

Accordingly, DeSi's motions are denied, Guardian's motion is granted, and plaintiff's motion is denied in part and stayed in part. The parties are strongly urged to discuss settlement, and this case is set for report on status January 28, 1997 at 10:00 am.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge	James F. Holderman
Case Number	96 C 329
Case Title	Smith v. DeSi, et al
Date	Dec. 23, 1996

Other docket entry: Defendant Guardian National's motion for clarification or amendment *nunc pro tunc* of this court's 12/23/96 opinion is granted. Remaining state law claims against defendant Guardian (Count 5 and the first count numbered 8) are dismissed *nunc pro tunc* as of 12/23/96 because they do not independently support federal jurisdiction.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

JUDGMENT IN A CIVIL CASE
AS TO DEFENDANT GUARDIAN
NATIONAL ACCEPTANCE CORP., only.
Case Number: 96 C 329

DAVITA M. SMITH, etc., Plaintiff

vs

DeSi AUTO SALES, INC, et al, Defendants

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to a hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that on December 23, 1996 defendant Guardian's motion to dismiss counts 1, 2, 3, 4 and 7 was granted.

Further ordered that the remaining state law claims against defendant Guardian (Count 5 and first count numbered 8) are dismissed nunc pro tunc as of 12/23/96 because they do not independently support federal jurisdiction.

There being no just reason for delay, this is a final and appealable order as to defendant Guardian National Acceptance Corp.

January 10, 1997
Date

H. Stuart Cunningham
Clerk

/s/
(By) Deputy Clerk

[Filed November 17, 1995]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

JERRY TAYLOR and MARY TAYLOR, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	No. 95 C 6619
v.	)	Judge Norgle
	)	Magistrate Judge Rosemond
QUALITY HYUNDAI, INC.; BANK ONE, MILWAUKEE, N.A.; and BANK ONE, CHICAGO, N.A.,	)	JURY DEMANDED
Defendants.	)	

AMENDED COMPLAINT—CLASS ACTION

MATTERS COMMON TO MULTIPLE COUNTS

INTRODUCTION

1. This action seeks redress for Truth in Lending violations and unfair and deceptive practices committed by defendant Quality Hyundai, Inc. ("Quality") in connection with the sale of extended warranties and service contracts in motor vehicle installment transactions. Plaintiffs complain that Quality misrepresents in the "Itemization of Amount Financed" of its Truth in Lending disclosures the amounts disbursed to entities which issue extended warranties or service contracts in connection with motor vehicle installment purchase transactions, thereby overcharging consumers. Plaintiffs al-

lege that the misrepresentations violate the Truth in Lending Act, 15 U.S.C. §1601 et seq. ("TILA"), implementing Federal Reserve Board Regulation Z (Count I), the Illinois Consumer Fraud Act (Counts II and III), and the Illinois Sales Finance Agency Act (Count IV). Bank One, Milwaukee, N.A., and Bank One, Chicago, N.A. are liable for the violations under the terms of the retail installment contract and 15 U.S.C. §1641.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over this action under 15 U.S.C. §1640 and 28 U.S.C. §§1331, 1337 and 1367. Venue in this District is proper, in that the claim arose here.

PARTIES

3. Plaintiffs Jerry Taylor and Mary Taylor are individuals who reside at 657 West 87th Street, Chicago, Illinois 60620.

4. Defendant Quality Hyundai, Inc. is a car dealership located at 9205 South Western Avenue, Chicago, Illinois 60620.

5. Defendant Bank One, Milwaukee, N.A. is a bank with a business location at 111 East Wisconsin Avenue, Milwaukee, Wisconsin 53201.

6. Defendant Bank One, Chicago, N.A. is a bank with a business location at 208 South LaSalle Street, Suite 10, Lower Level, Chicago, Illinois 60604.

PLAINTIFFS' TRANSACTION WITH DEFENDANTS

7. In July 1995, plaintiffs purchased from Quality a new 1995 Hyundai Accent.

8. Plaintiffs purchased the car for personal, family or household purposes, and the transaction was documented as a consumer credit transaction by Quality.

9. In connection with this transaction, plaintiffs and Quality signed the motor vehicle retail installment sales contract, an accurate copy of which is attached as Exhibit A.

10. The retail installment contract states that it will be assigned to Bank One Milwaukee and on information and belief was so assigned.

11. Subsequently, plaintiffs received a instalment loan payment book directing them to make payments to Bank One Chicago. An accurate copy of the coupon form is attached as Exhibit B. On information and belief, Bank One Chicago took an assignment of or other interest in the plaintiffs' contract.

DEFECTS IN DISCLOSURES

12. As part of their automobile purchase transaction, plaintiffs purchased an extended warranty or service contract, for which they were charged $1395.00.

13. The "itemization of amount financed" on Exhibit A represents as follows with respect to the service contract or extended warranty:

Itemization of Amount Financed

Cash Price	$ 12,081.00
Less Cash Down Payment	$ 900.00
Less Trade-In	$ N/A

Amounts Paid on Your Account

Unpaid Balance of Cash Price	$ 11,181.00

Amounts Paid to Others for You

Unpaid Balance Due on Trade-In	$ N/A
(Paid to)	
Insurance Companies	$ 2,468.52
Public Officials (License, Title & Taxes)	$ 1,003.00
To Western Nat	$ 1,395.00

14. The representations quoted in ¶13 were not accurate. Quality did not pay the sum listed to Western National for the vehicle service contract.

15. On information and belief, based on investigation of counsel into industry practices, the actual financial arrangements with respect to the issuance of the extended warranties or service contracts were as follows:

a. Quality paid a small portion of the service contract fee to Western National.

b. Quality retained the balance of the charge.

16. The manner of "disclosing" extended warranties and service contracts set forth in ¶13 is misleading and deceptive, in that:

a. Quality represents that the entire amount of the service contract is being disbursed to the company named, in this case Western National, when that is simply not the case.

b. Although the amount of the service contract is simply a price that Quality unilaterally determines for the warranty or contract, and is therefore negotiable in the same manner that the price of the vehicle is negotiable, the "disclosure" places the item in conjunction with license, title, registration and filing fees, taxes, and insurance premiums, none of which are negotiable, thereby suggesting that it is similar in nature.

17. The manner of "disclosing" extended warranties and service contracts set forth in ¶13 results in gross overcharging on extended warranties and service contracts.

18. If plaintiffs and the class members were informed of (i) the actual amount disbursed by Quality to the warranty or contract issuer or administrator (in this case, Western National), and (ii) that the amount listed was negotiable, they would not pay as much for the extended warranty or service contract.

19. Plaintiffs and the class members were not familiar with the financial arrangements concerning extended warranties and service contracts, and accepted the form of representation quoted in ¶13, above, as true.

20. Plaintiffs and the class members accordingly relied upon and were deceived by the representations set forth in ¶13.

21. Quality intended plaintiffs and other customers to rely on the representations set forth in ¶13, and thereby not negotiate the price of extended warranties and service contracts and be overcharged for such warranties and contracts.

22. In all cases in which the purchase of an extended warranty or service contract is reflected in the manner set forth in ¶13, the amount listed as having been paid to a third party for an extended warranty or service contract is significantly larger than both the amount actually paid to the third party and any suggested retail price for the warranty or service contract.

23. It was the standard practice and policy of Quality to disclose extended warranties and service contracts on retail installment contracts in the manner set forth in ¶13.

24. The market for warranties is non-competitive. Generally, they can be purchased only from the dealer at the time of the car purchase. The misrepresentations and omissions complained of herein are especially material in light of this fact.

LIABILITY OF THE BANK ONE ENTITIES

25. Each motor vehicle retail installment sales contract assigned to the Bank One entities provided: "Any holder of this consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained pur-

suant thereto or with the proceeds hereof. Recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder."

26. Each of the Bank One entities had, from its extensive experience in financing used car transactions, actual knowledge of the amounts which car dealers disbursed to the issuers of extended warranties and service contracts, and knew full well that the amounts represented on the retail installment contracts of plaintiffs and the class members as having been disbursed to the issuers of extended warranties and service contracts were not in fact disbursed to those issuers.

27. The Bank One entities benefitted when car dealers increased the amount financed, through inflating the price of extended warranties or service contracts, because the Bank One entities thereby lent more money and the Bank One entities are in the business of lending money.

28. The Bank One entities approved of the practice of Quality and other car dealers with which it did business listing the charge for an extended warranty or service contract as an "Amount Paid to Others for You." The Bank One entities received hundreds or thousands of contracts so listing the charge for an extended warranty or service contract, and allowed the dealers to list it in that manner.

CLASS ALLEGATIONS

29. Pursuant to Fed.R.Civ.P. 23, plaintiffs bring this action on behalf of a class. The class consists of all persons who satisfy the following criteria:

a. They entered into a automobile transaction with Quality.

b. In connection with their automobile transaction, they purchased a service contract or extended warranty from Quality.

c. Their transaction was financed by a retail installment contract.

d. Their transaction was documented as a consumer transaction (i.e., TILA disclosures were given).

e. The retail installment contract contains the form of representations set forth in ¶13; i.e., states that an amount was paid to a third party on account of an extended warranty or service contract that is other than the amount actually collected by the third party.

30. For purposes of Count I, the TILA claim, the class includes anyone whose retail installment contract is dated within one year prior to the filing of this action. For purposes of Count II, the ICFA claim, the class includes anyone whose retail installment contract was outstanding within three years prior to the filing of this action.

31. Each class is so numerous that joinder of all members is impracticable. Quality enters into hundreds of automobile transactions each year, of which a substantial majority are financed and a large proportion involve the purchase of an extended warranty or service contract.

32. There are questions of law or fact common to each class, which predominate over any questions affecting only individual members of each class. With

respect to Counts I and II, the common questions of law or fact include:

a. Whether the representations complained of constitute an inaccurate disclosure of the itemization of amount financed, and thus violates 12 C.F.R. §226.18.

b. Whether the representations complained of have the tendency or capacity to deceive consumers.

c. Whether defendants are liable for the difference between the money actually paid to a third party for a service contract or extended warranty and the amounts represented to have been paid.

33. Plaintiffs will fairly and adequately represent the interests of class members. Plaintiffs have suffered pecuniary injuries as a result of defendants' practices. Plaintiffs have retained experienced counsel to prosecute this action. Neither plaintiffs nor their counsel have any interests which would lead them not to vigorously prosecute this action.

34. A class action is a superior means for the fair and efficient prosecution of this litigation. Most of the class members are not aware of the wrong or their right to legal redress, making a class action essential. Individual litigation is not economically feasible. At the same time, Quality derives enormous aggregate profits from wrongfully depriving numerous persons of amounts ranging from several hundred to several thousand dollars each. In the absence of a class action, this serious wrong will go unredressed.

COUNT I—TRUTH IN LENDING ACT
DISCLOSURE VIOLATIONS

35. Plaintiffs incorporate ¶¶1-34.

36. Quality is a "creditor" within the meaning of TILA and Regulation Z. During each of the last several years, entered into more than 25 transactions per year in which credit is extended in exchange for a finance charge, or in which a consumer contracted to pay for a vehicle in four or more installments.

37. The transactions of plaintiffs and the class members with Quality were extensions of consumer credit by a creditor subject to TILA and Regulation Z.

38. Regulation Z, 12 C.F.R. §226.18, provides that the "creditor shall disclose the following information as applicable:

* * *

(c) Itemization of amount financed.

(1) A separate written itemization of the amount financed, including:

(i) The amount of any proceeds distributed directly to the consumer.

(ii) The amount credited to the consumer's account with the creditor.

(iii) Any amounts paid to other persons by the creditor on the consumer's behalf. The creditor shall identify those persons.

(iv) The prepaid finance charge.

39. Regulation Z, 12 C.F.R. §226.17(a)(1), requires that the disclosures specified in §226.18 be made "clear-

ly and conspicuously," which includes the requirement that they be accurate.

40. Quality failed to comply with these disclosure requirements, in that it disclosed the extended warranty/service contract charges in a misleading and inaccurate manner, and in that it falsely identified as "amounts paid to other persons by the creditor on the consumer's behalf" a sum which in fact was "credited to the consumer's account with the creditor."

41. Plaintiffs and the class members suffered actual damages from the misleading and inaccurate disclosures, in that they were overcharged for extended warranties and service contracts.

WHEREFORE, plaintiffs request that the Court enter judgment in his favor and in favor of the class members and against defendants as follows:

a. For appropriate damages.

b. For attorney's fees, litigation expenses and costs.

c. For such other or further relief as the Court deems appropriate.

COUNT II—ILLINOIS CONSUMER FRAUD ACT DISCLOSURE VIOLATIONS

42. Plaintiffs incorporate ¶¶1-34.

43. Section 2 of the Illinois Consumer Fraud Act, 815 ILCS 505/2, provides:

> **[U]nfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false**

promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act.

44. Quality's conduct in disclosing extended warranties and service contracts, as set forth in ¶13 above, is an unfair and deceptive practice.

45. Section 10a of ICFA, 815 ILCS 505/10a, provides in relevant part:

(a) Any person who suffers damage as a result of a violation of Sections 2 through 2BB of this Act committed by any other person may bring an action against such person. The court, in its discretion may award actual damages or any other relief which the court deems proper. Proof of a public injury, a pattern, or an effect on consumers generally shall not be required.

. . .

(c) In any action brought by a person under this Section, the Court may grant injunctive relief where appropriate and may award, in addition to the relief provided in this Section, reasonable attorney's fees and costs to the prevailing party.

46. Plaintiffs and the class members were damaged, in that they paid an amount in excess of that actually remitted to the issuers of the service contracts or extended warranties, and were overcharged.

47. Quality's conduct was knowing and wilful and carried out for pecuniary gain, warranting the imposition of substantial punitive damages.

WHEREFORE, plaintiffs request that the Court enter judgment in his favor and in favor of the class members and against defendants, as follows:

a. For compensatory damages.

b. For punitive damages.

c. For an injunction halting the practice complained of.

d. For attorney's fees, litigation expenses and costs.

e. For such other or further relief as the Court deems appropriate.

COUNT III—ILLINOIS CONSUMER FRAUD ACT

48. Plaintiffs incorporate ¶¶1-34.

49. In each of the plaintiffs' transactions and each of the transactions of the members of the class, the car dealer failed to furnish disclosures that complied with TILA.

50. In each of the plaintiffs' transactions and each of the transactions of the members of the class, the car dealer failed to otherwise comply with §5 of the Illinois Motor Vehicle Retail Installment Sales Act, 815 ILCS 375/5.

51. No finance charges, delinquency charges or collection charges are therefore collectable from plaintiffs and the class members, pursuant to §24 of MVRISA, 815 ILCS 375/24.

52. The Bank One entities, knowing of the improper disclosures, nevertheless have collected and are seeking to collect finance charges, delinquency charges and collection charges on the subject transactions.

53. Plaintiffs and the class members were thereby damaged.

54. By collecting and seeking to collect finance charges, the Bank One entities have violated §§2, 2E and 2F of the Illinois Consumer Fraud Act.

55. Section 2 of the Illinois Consumer Fraud Act, 815 ILCS 505/2, provides:

> **[U]nfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act.**

56. Section 2E of the Illinois Consumer Fraud Act, 815 ILCS 505/2E, provides:

> **Any person who is regularly engaged in the business of providing or furnishing merchandise to consumers or in making loans to consumers and who has committed in any calendar year 3 or more violations, as determined in any civil or criminal proceeding, of the "Consumer Finance Act"; the "Consumer Installment Loan Act" [205 ILCS 670/1 et seq.]; the "Retail Installment Sales Act" [815 ILCS 405/1 et seq.]; the "Motor Vehicle Retail Installment Sales Act" [815 ILCS 375/1 et seq.]; "An Act to revise the law in relation to the rate of interest and to repeal certain acts therein named", approved May 24, 1879, as amended [815 ILCS 205/0.01 et seq.]; "An Act to promote the welfare of wage-earners by regulating the assignment of wages, and prescribing a penalty for the violation thereof", approved July 1, 1935, as amended [740 ILCS 170/.01 et seq.]; or Part 8 of Article XII of the Code of Civil Procedure, as amended [735 ILCS 5/12-801 et seq.], or of any 2 or more of those Acts, is guilty of an unlawful practice within the meaning of this Act. Nothing in this Section prohibits the prosecution of a person under the Acts specified herein as well as under this Act.**

57. Section 2F of the Illinois Consumer Fraud Act, 815 ILCS 505/2F, provides:

> **Any person who is held in any civil or criminal proceeding to have wilfully and materially violated any Illinois statutory provision regulating the extension of credit to borrowers or designed to protect the consumer purchasing**

merchandise in a credit, as contrasted from a cash, transaction is guilty of an unlawful practice within the meaning of this Act. Nothing in this Section prohibits the prosecution of a person under the statute violated as well as under this Act.

58. The noncompliance of each car dealer which prepared contracts in the manner complained of occurred on more than three occasions per year and was intentional.

59. Section 10a of the Illinois Consumer Fraud Act, 815 ILCS 505/10a, provides in relevant part:

(a) Any person who suffers damage as a result of a violation of Sections 2 through 2BB of this Act committed by any other person may bring an action against such person. The court, in its discretion may award actual damages or any other relief which the court deems proper. Proof of a public injury, a pattern, or an effect on consumers generally shall not be required.

. . .

(c) In any action brought by a person under this Section, the Court may grant injunctive relief where appropriate and may award, in addition to the relief provided in this Section, reasonable attorney's fees and costs to the prevailing party.

60. Defendants' conduct was knowing and wilful and carried out for pecuniary gain, warranting the imposition of substantial punitive damages.

WHEREFORE, plaintiffs request that the Court enter judgment in their favor and in favor of the class members and against defendants as follows:

a. For compensatory damages.

b. For punitive damages.

c. For an injunction halting the practice complained of.

d. For attorney's fees, litigation expenses and costs.

e. For such other or further relief as the Court deems appropriate.

/s/_____
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[Filed January 13, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVITA M. SMITH, on behalf of herself and all others similarly situated, Plaintiff,	)	No. 96 C 0329
	)	Judge Holderman
v.	)	Magistrate Judge Pallmeyer
DeSI AUTO SALES, INC. and GUARDIAN NATIONAL ACCEPTANCE CORPORATION, Defendants.	)	JURY DEMANDED

AMENDED COMPLAINT—CLASS ACTION

MATTERS COMMON TO MULTIPLE COUNTS

INTRODUCTION

1. This action seeks redress for Truth in Lending violations and unfair and deceptive practices committed by defendants DeSi Auto Sales, Inc. ("DeSi"), and Guardian National Acceptance Corp. ("Guardian"), in connection with motor vehicle installment transactions.

2. Plaintiff complains that defendants misrepresent in the "Itemization of Amount Financed" of their Truth in Lending disclosures the amounts disbursed to entities which issue extended warranties or service contracts in connection with motor vehicle installment purchase transactions, thereby overcharging consumers. Plaintiff alleges that the misrepresentations violate the Truth in Lending Act, 15 U.S.C. §1601 et seq. ("TILA")

and implementing Federal Reserve Board Regulation Z (Count I), the Illinois Consumer Fraud Act ("CFA") (Counts II, III) and the Illinois Sales Finance Agency Act ("SFAA") (Count IV).

3. Plaintiff also alleges that the defendants have parties cosign on consumers' retail installment contracts in violation of the Illinois Motor Vehicle Retail Installment Sales Act ("MVRISA"), and by attempting to obligate persons who cannot legally be obligated, violate the Illinois Consumer Fraud Act (Count V).

4. Plaintiff further alleges that DeSi sold her a defective and unmerchantable vehicle, in violation of the federal Magnuson-Moss Consumer Product Warranty Act ("Magnuson-Moss"), 15 U.S.C. §2301 et seq. (Count VI) and the Uniform Commercial Code (Count VII).

5. Finally, plaintiff alleges that DeSi violated TILA by improperly listing a down payment of $1277.78 when the actual amount was $800 (Count VIII).

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over this action under 15 U.S.C. §1640 and 28 U.S.C. §§1331, 1337 and 1367. Venue in this District is proper, in that the claim arose here and the defendants may be found here.

PARTIES

7. Plaintiff, Davita M. Smith, is an individual who resides at 7655 S. Hoyne St. Chicago, Illinois 60620.

8. Defendant DeSi Auto Sales, Inc. ("DeSi") is a corporation that operates a car dealership located at 3750 Touhy Ave., Elk Grove Village, Illinois 60007.

9. Defendant Guardian National Acceptance Corp. ("Guardian") is a corporation located at 17570 West Twelve Mile Road, Southfield, Michigan 48076.

10. Guardian provides financing for the purchase of used automobiles through acquisitions of retail installment sales contracts; and offers credit life, disability coverage and repair service contracts.

11. Guardian has a portfolio of approximately $62,143,877 in outstanding auto loans, and installment contracts.

PLAINTIFF'S TRANSACTION WITH DEFENDANTS

12. In August of 1995, plaintiff Davita M. Smith purchased from DeSi a used 1991 Mercury Cougar.

13. Plaintiff purchased the car for personal, family or household purposes (general personal transportation), and the transaction was documented as a consumer credit transaction by DeSi.

14. In connection with this transaction, plaintiff and DeSi signed the motor vehicle retail installment sales contract attached as Exhibit A.

15. The vehicle retail installment contract was in turn assigned to Guardian.

DEFECTS IN DISCLOSURES
EXTENDED WARRANTY/SERVICE CONTRACT

16. As part of her automobile purchase transaction, plaintiff purchased an extended warranty or service contract, for which she was charged $795.00. The warranty agreement is attached as Exhibit B.

17. The "itemization of amount financed" on Exhibit A represents as follows with respect to the service contract or extended warranty, and the cash down payment:

Itemization of Amount Financed

Cash Price	$11,734.00
Less Cash Down Payment	$ 1,277.78
Less Trade-In	$ N/A

Amounts Paid on Your Account

Unpaid Balance of Cash Price	$10,457.02

Amounts Paid to Others for You

Unpaid Balance Due on Trade-In	$ N/A
To: _____	
Insurance Companies	$ N/A
Public Officials	$ 1002.98
(License, Title & Taxes)	
To Documentary Service Fee	$ 40.00
To E.S.C	$ 799.00
To N/A	$ N/A

18. E.S.C. refers to the issuer of the Extended Service Contract/Warranty.

19. The representations quoted in ¶17 were not accurate. DeSi did not pay the sum of $799 to the issuer of the extended service contract/warranty.

20. It was the standard practice and policy of DeSi and the other dealers whose contracts were purchased by Guardian ("Dealers"), to disclose extended warranties and service contracts on retail installment contracts in the manner set forth in ¶17.

21. On information and belief, based on investigation of counsel into industry practices, the actual financial arrangements with respect to the issuance of the extended warranties or service contracts were as follows:

a. DeSi and Dealers, paid a small portion of the service contract fee to the warranty issuer.

b. DeSi and Dealers, retained the balance of the charge.

22. The manner of "disclosing" extended warranties and service contracts set forth in ¶17 is misleading and deceptive, in that:

a. DeSi and Dealers represent that the entire amount of the service contract is to be disbursed to the warranty issuer, when that is simply not the case.

b. Although the amount of the service contract is simply a price that DeSi and Dealers unilaterally determines for the warranty or contract, and is therefore negotiable in the same manner that the price of the vehicle is negotiable, the "disclosure" places the item in conjunction with license, title, registration and filing fees, taxes, and insurance premiums, none of which are negotiable, thereby suggesting that it is similar in nature.

23. The manner of "disclosing" extended warranties and service contracts set forth in ¶17 results in

gross overcharging on extended warranties and service contracts. According to an investigation conducted by the Attorney General of New York of service contracts sold at the beginning of the 1990 model year, many such warranties and contracts were sold at grossly inflated prices, frequently far exceeding the suggested resale price of the company underwriting or issuing the warranty or contract. The Attorney General's Report on Dealer Pricing Practices in the Sale of Automobile Extended Service Contracts: Consumers are Paying Too Much, (May, 1990). (Exhibit C).

24. If the average consumer were to be informed of the actual amount disbursed by DeSi and Dealers to the warranty or contract issuer or administrator, he or she would not pay as much for the extended warranty or service contract.

25. Plaintiff would not have paid as much had she been so informed.

26. The average consumer is not familiar with the financial arrangements concerning extended warranties and service contracts, and accepts the form of representation quoted in ¶17, above, as true.

27. Plaintiff was not familiar with the financial arrangements concerning extended warranties and service contracts, and accepted the form of representation quoted above as true.

28. Plaintiff reasonably relied upon and was deceived by the representations set forth in ¶17.

29. DeSi and Dealers intended plaintiff and other customers to rely on the representations set forth in ¶17, and thereby not negotiate the price of extended

warranties and service contracts and be overcharged for such warranties and contracts.

30. In all cases in which the purchase of an extended warranty or service contract is reflected in the manner set forth in ¶17, the amount listed as having been paid to a third party for an extended warranty or service contract is significantly larger than both the amount actually paid to the third party and any suggested retail price for the warranty or service contract.

31. The consumer can only purchase extended warranties or service contracts at the time of the car purchase through the dealer.

32. Service contracts and extended warranties are therefore sold in a non-competitive manner.

33. Because of the manner in which extended warranties and service contracts are sold, the misrepresentation and nondisclosure complained of are especially likely to adversely affect the consumer.

DEFECTS IN DISCLOSURES
DOWN PAYMENT

34. In connection with her automobile purchase transaction, plaintiff made a cash down payment.

35. Plaintiff's cash down payment was $800.

36. DeSi filled in the contract to list a $1277.78 down payment. This violated 12 C.F.R. §226.18.

37. DeSi and Dealers do not charge the same amount in cash and credit transactions for the same extended warranty or service contract in all cases.

ILLINOIS STATUTORY RESTRICTIONS ON LIABILITY OF COSIGNERS

38. Section 18 of the Illinois Motor Vehicle Retail Installment Sales Act ("MVRISA"), 815 ILCS 375/18, sharply restricts the liability of persons who do not actually receive motor vehicles purchased on time:

> Co-signers. Each person, other than a seller or holder, who signs a retail installment contract may be held liable only to the extent that he actually receives the motor vehicle described or identified in the contract, except that a parent or spouse who co-signs such retail installment contract may be held liable to the full extent of the deferred payment price notwithstanding such parent or spouse has not actually received the motor vehicle described or identified in the contract and except to the extent such person other than a seller or holder, signs in the capacity of a guarantor of collection.
>
> The obligation of such guarantor is secondary, and not primary. The obligation arises only after the seller or holder has diligently taken all ordinary legal means to collect the debt from the primary obligor, but has not received full payment from such primary obligor or obligors.
>
> No provisions in a retail installment contract obligating such guarantor is valid unless:
>
> (1) there appears below the signature space provided for such guarantor the following:
>
> "I hereby guarantee the collection of the above described amount upon failure of the seller named herein to collect said amount from the buyer named herein."; and
>
> (2) unless the guarantor, in addition to signing the retail installment contract, signs a separate instrument in the following form:

"EXPLANATION OF GUARANTOR'S OBLIGATION

You ..... (name of guarantor) by signing the retail installment contract and this document are agreeing that you will pay ..... (total deferred payment price) for the purchase of ..... (description of goods or services) purchased by ..... (name of buyer) from ..... (name of seller).

Your obligation arises only after the seller or holder has attempted through the use of the court system to collect this amount from the buyer.

If the seller cannot collect this amount from the buyer, you will be obligated to pay even though you are not entitled to any of the goods or services furnished. The seller is entitled to sue you in court for the payment of the amount due."

The instrument must be printed, typed, or otherwise reproduced in a size an style equal to at least 8 point bold type, may contain no other matter (except a union printing label) than above set forth and must bear the signature of the co-signer and no other person. The seller must give the co-signer a copy of the retial installment contract and a copy of the co-signer statement.

39. Mr. Williams accordingly could not be made liable except as a guarantor of collectibility.

40. Mr. Williams' signature on Exhibit A in any other capacity was ineffective to create any liability.

IMPROPER PRACTICES WITH RESPECT TO COSIGNERS

41. Defendants have a policy and practice of having persons who cannot be made subject to liability except (assuming that the statutory prerequisites are complied with) as guarantors of collectibility sign retail installment contracts as "co-buyers."

42. Pursuant to this policy and practice, Mr. Williams signed as a "co-buyer," and was not given the notice mandated by §18 of MVRISA.

43. Defendants' credit investigation reveals the correct addresses of the "Buyer" and "Co-Buyer" and sufficient information about the parties' relationship to determine whether the statutory prerequisites for liability are in fact present. For example, in the case of Mr. Williams and Ms. Smith, DeSi was informed of the parties' actual relationship. DeSi informed Guardian that the relationship was that of uncle-niece, which is not a permissible relationship for a cosigner.

44. Pursuant to the policy and practice complained of, defendants would nevertheless have persons such as Mr. Williams sign as "Co-Buyer" and fail to document its files to show that the second signer could be made liable under §18 of MVRISA.

45. Section 2 of the Illinois Consumer Fraud Act, 815 ILCS 505/21 provides:

> **Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with**

intent that others rely upon the concealment, suppression or omission of such material fact, . . . are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act.

46. Defendants engaged in the following unfair and deceptive acts and practices pursuant to the policy and practice described above:

a. Defendants had individuals who were not subject to liability except as guarantors of collectibility under §18 of MVRISA sign motor vehicle retail installment sales contracts as "co-buyers," thereby purporting to obligate themselves on unenforceable obligations. This conduct had the tendency and capacity to deceive the affected persons and to obtain money from them.

b. Defendants misrepresented the extent of co-signers' liability under motor vehicle retail installment sales contracts.

c. Defendants or auto dealers acting in concert with defendants failed to provide persons protected by §18 of MVRISA with the notice required by §18, which omission was calculated to mislead them into believing the extent of their obligation was greater than it in fact was.

VIOLATION OF IMPLIED WARRANTIES OF MERCHANTABILITY

47. Beginning immediately after the sale, plaintiff experienced a serious problem with the engine of the

vehicle, and on September 19, 1995, DeSi referred her to Perfect Performance, an automotive repair shop.

48. Perfect Performance discovered a pinhole in the radiator, which allowed all the engine coolant to drain from the engine. This in turn had caused the engine to overheat causing severe engine damage.

49. Plaintiff has been told by the warranty company that the warranty will not cover the cost of repairing or replacing the engine.

50. A vehicle with a radiator in such condition that the engine coolant will drain out and ruin the engine is not merchantable.

LIABILITY OF GUARDIAN

51. Each motor vehicle retail installment sales contract assigned to Guardian provided: "Any holder of this consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained pursuant hereto or with the proceeds hereof. Recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder."

52. Guardian had, from its extensive experience in financing used car transactions, actual knowledge of the amounts which car dealers disbursed to the issuers of extended warranties and service contracts, and knew full well that the amounts represented on the retail installment contracts of plaintiffs and the class members as having been disbursed to the issuers of extended warranties and service contracts were not in fact disbursed to those issuers.

53. Guardian benefitted when car dealers increased the amount financed, through inflating the price of extended warranties or service contracts, because Guardian thereby lent more money and Guardian is in the business of lending money.

54. Guardian approved of the practice of DeSi and other car dealers with which it did business listing the charge for an extended warranty or service contract as an "Amount Paid to Others for You." Guardian received hundreds or thousands of contracts so listing the charge for an extended warranty or service contract, and allowed the dealers to list it in that manner.

55. Guardian is legally chargeable with knowledge of MVRISA §18. Guardian obtained a license under the SFAA from the State of Illinois and in doing so was informed of the laws with which it must comply.

COUNT I—TRUTH IN LENDING ACT

56. Plaintiff incorporates ¶¶1-55.

57. DeSi is a "creditor" within the meaning of TILA and Regulation Z. During each of the last several years, DeSi entered into more than 25 transactions per year in which credit is extended in exchange for a finance charge, or in which a consumer contracted to pay for a vehicle in four or more installments.

58. Other car dealers that sell retail installment transactions to Guardian are "creditors" within the meaning of TILA and Regulation Z. During each of the last several years, these dealers entered into more than 25 transactions per year in which credit is extended in exchange for a finance charge, or in which a consumer

contracted to pay for a vehicle in four or more installments.

59. The transactions of plaintiff and the class members with DeSi and with other car dealers that in turn sell those transactions to Guardian, were extensions of consumer credit by a creditor subject to TILA and Regulation Z.

60. Regulation Z, 12 C.F.R. §226.18, provides that the "creditor shall disclose the following information as applicable:

(c) Itemization of amount financed.

(1) A separate written itemization of the amount financed, including:

(i) The amount of any proceeds distributed directly to the consumer.

(ii) The amount credited to the consumer's account with the creditor.

(iii) Any amounts paid to other persons by the creditor on the consumer's behalf. The creditor shall identify those persons.

(iv) The prepaid finance charge.

61. Regulation Z, 12 C.F.R. §226.17(a)(1), requires that the disclosures specified in §226.18 be made "clearly and conspicuously," which includes the requirement that they be accurate.

62. DeSi and other dealers that made disclosures in the form represented in ¶11 failed to comply with these disclosure requirements, in that it disclosed the extended warranty/service contract charges in a misleading and inaccurate manner, and in that it falsely

identified as "amounts paid to other persons by the creditor on the consumer's behalf" a sum which in fact was "credited to the consumer's account with the creditor."

CLASS ALLEGATIONS

63. Pursuant to Fed.R.Civ.P. 23, plaintiff brings this count on behalf of two classes, designated A and B.

64. Class A consists of all persons who satisfy the following criteria:

a. They entered into a automobile transaction.

b. In connection with their automobile transaction, they purchased a service contract or extended warranty.

c. Their transaction was financed by a retail installment contract.

d. Their transaction was documented as a consumer transaction (i.e., TILA disclosures were given).

e. The retail installment contract contains the form of representation set forth in ¶17; i.e., states that an amount was paid to a third party for purchase of an extended warranty or service contract that is other than the amount actually collected by the third party.

65. Class B consists of all persons who satisfy the following criteria:

a. They entered into a automobile transaction.

b. In connection with their automobile transaction, they purchased a service contract or extended warranty.

c. Their transaction was financed by a retail installment contract.

d. Their transaction was documented as a consumer transaction (i.e., TILA disclosures were given).

e. The retail installment contract contains the form of representation set forth in ¶17; i.e., states that an amount was paid to a third party for purchase of an extended warranty or service contract that is other than the amount actually collected by the third party.

f. Guardian is or was a holder of the retail installment contract.

66. For the purpose of this count, the classes include anyone whose retail installment contract is dated within one year of the filing of this action.

67. The classes are so numerous that joinder of all members is impracticable. DeSi and the other dealers that sell transactions to Guardian enter into hundreds of automobile transactions each year, of which a substantial majority are financed and a large proportion involve the purchase of an extended warranty or service contract.

68. There are questions of law or fact common to the class which predominate over any questions affecting only individual members of the class. The common questions of law or fact include the following:

a. Whether the representations complained of constitute an inaccurate disclosure of the itemization of amount financed, and thus violate 12 C.F.R. §226.18.

b. Whether the representations complained of have the tendency or capacity to deceive consumers.

c. Whether defendants are liable for the difference between the money actually paid to a third party for a service contract or extended warranty and the amounts represented to have been paid.

d. Whether the violations were willful and material.

69. Plaintiff will fairly and adequately represent the interests of the class members. Plaintiff has suffered pecuniary injuries as a result of defendants' practices. Plaintiff has retained experienced counsel to prosecute this action. Neither plaintiff nor her counsel have any interests which would lead them not to vigorously prosecute this action.

70. A class action is a superior means for the fair and efficient prosecution of this litigation. Most of the class members are not aware of the wrong or their right to legal redress, making a class action essential. Individual litigation is not economically feasible. At the same time, defendants derive enormous aggregate profits from wrongfully depriving many consumers of amounts ranging from several hundred to several thousand dollars each. In the absence of a class action, this serious wrong will go unredressed.

71. Plaintiff and the class members suffered actual damages from the misleading and inaccurate disclosures, in that they were overcharged for extended warranties and service contracts.

WHEREFORE, plaintiff requests that the Court enter judgment in her favor and in favor of the class members of classes A and B and against DeSi and Guardian, respectively, as follows:

a. For appropriate damages.

b. For attorney's fees, litigation expenses and costs.

c. For such other or further relief as the Court deems appropriate.

COUNT II—ILLINOIS CONSUMER FRAUD ACT

72. Plaintiff incorporates ¶¶1-55.

73. Section 2 of the Illinois Consumer Fraud Act, 815 ILCS 505/2, provides:

> **[U]nfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act.**

74. The conduct of DeSi and the other dealers in disclosing extended warranties and service contracts, as set forth in ¶17 above, is an unfair and deceptive practice.

75. Section 10a of the Illinois Consumer Fraud Act, 815 ILCS 505/10a, provides in relevant part:

> **(a) Any person who suffers damage as a result of a violation of Sections 2 through 2BB of this Act committed by any other person may bring an action against such person. The court, in its discretion may award actual damages or any other relief which the court deems proper. Proof of a public injury, a pattern, or an effect on consumers generally shall not be required.**
>
> . . .
>
> **(c) In any action brought by a person under this Section, the Court may grant injunctive relief where appropriate and may award, in addition to the relief provided in this Section, reasonable attorney's fees and costs to the prevailing party.**

CLASS ALLEGATIONS

76. Pursuant to Fed.R.Civ.P. 23, plaintiff brings this count on behalf of two classes, designated A and B.

77. Class A consists of all persons who satisfy the following criteria:

a. They entered into a automobile transaction.

b. In connection with their automobile transaction, they purchased a service contract or extended warranty.

c. Their transaction was financed by a retail installment contract.

d. Their transaction was documented as a consumer transaction (i.e., TILA disclosures were given).

e. The retail installment contract contains the form of representation set forth in ¶17; i.e., states that an amount was paid to a third party for purchase of an extended warranty or service contract that is other than the amount actually collected by the third party.

78. Class B consists of all persons who satisfy the following criteria:

a. They entered into a automobile transaction.

b. In connection with their automobile transaction, they purchased a service contract or extended warranty.

c. Their transaction was financed by a retail installment contract.

d. Their transaction was documented as a consumer transaction (i.e., TILA disclosures were given).

e. The retail installment contract contains the form of representation set forth in ¶17; i.e., states that an amount was paid to a third party for purchase of an extended warranty or service contract that is other than the amount actually collected by the third party.

f. Guardian is or was a holder of the retail installment contract.

79. For the purpose of this count, the classes include any Illinois resident whose retail installment contract was outstanding within three years of the filing of this action.

80. The classes are so numerous that joinder of all members is impracticable.

81. There are questions of law or fact common to the class which predominate over any questions affecting only individual members of the class. The common questions of law or fact include the following:

a. Whether the representations complained of constitute an inaccurate disclosure of the itemization of amount financed, and thus violate 12 C.F.R. §226.18.

b. Whether the representations complained of have the tendency or capacity to deceive consumers.

c. Whether defendants are liable for the difference between the money actually paid to a third party for a service contract or extended warranty and the amounts represented to have been paid.

d. Whether the violations were willful and material.

82. Plaintiff will fairly and adequately represent the interests of the class members. Plaintiff has suffered pecuniary injuries as a result of defendants' practices. Plaintiff has retained experienced counsel to prosecute this action. Neither plaintiff nor her counsel have any interests which would lead them not to vigorously prosecute this action.

83. A class action is a superior means for the fair and efficient prosecution of this litigation. Most of the

class members are not aware of the wrong or their right to legal redress, making a class action essential. Individual litigation is not economically feasible. At the same time, defendants derive enormous aggregate profits from wrongfully depriving many consumers of amounts ranging from several hundred to several thousand dollars each. In the absence of a class action, this serious wrong will go unredressed.

84. Plaintiff and the class members were damaged, in that they paid an amount in excess of that actually remitted to the issuers of the service contracts or extended warranties, and were overcharged.

85. Defendants' conduct was knowing and wilful and carried out for pecuniary gain, warranting the imposition of substantial punitive damages.

WHEREFORE, plaintiff requests that the Court enter judgment in her favor and in favor of the class members of class A and B and against DeSi and Guardian, respectively, as follows:

a. For compensatory damages

b. For punitive damages.

c. For an injunction halting the practice complained of.

d. For attorney's fees, litigation expenses and costs.

e. For such other or further relief as the Court deems appropriate.

COUNT III—ILLINOIS CONSUMER FRAUD ACT

86. Plaintiff incorporates ¶¶1-55.

87. Section 5 of the Illinois Motor Vehicle Retail Installment Sales Act, ("MVRISA"), 815 ILCS 375/5, provides that:

a. Every retail installment contract shall disclose the following information when applicable:

> **(4) All other charges, individually itemized, which are not included in the amount financed but which are not part of the finance charge.**

b. Disclosures required to be given by this section shall be made clearly, conspicuously, and in a meaningful sequence.

c. Accurate disclosures complying with those required under TILA may be used.

88. In each of the plaintiff's transactions and each of the transactions of the members of the class, the car dealer failed to furnish disclosures complying with these disclosure requirements, in that it disclosed the extended warranty/service contract charges and in that it falsely identified as "amounts paid to other persons by the creditor on the consumer's behalf", a sum which in fact was "credited to the consumer's account with the creditor."

89. Section 24b of MVRISA, 815 ILCS 375/24b, provides:

> **No person who violates this Act, except as a result of an accident or bona fide error of computation, may recover any finance charge, any delinquency or collection charge or any**

refinance charge in connection with the related retail installment contract.

90. Guardian nevertheless has collected and is seeking to collect finance charges, delinquency charges and collection charges on the subject transactions.

91. Plaintiff and the class members have paid and are paying finance charges, collection charges and/or delinquency charges on their retail installment contracts.

92. Section 2 of the Illinois Consumer Fraud Act, 815 ILCS 505/2, provides:

[U]nfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act.

93. Section 2E of the Illinois Consumer Fraud Act, 815 ILCS 505/2E, provides:

Any person who is regularly engaged in the business of providing or furnishing merchandise to consumers or in making loans to con-

sumers and who has committed in any calendar year 3 or more violations, as determined in any civil or criminal proceeding, of the "Consumer Finance Act"; the "Consumer Installment Loan Act" [205 ILCS 670/1 et seq.]; the "Retail Installment Sales Act" [815 ILCS 405/1 et seq.]; the "Motor Vehicle Retail Installment Sales Act" [815 ILCS 375/1 et seq.]; "An Act to revise the law in relation to the rate of interest and to repeal certain acts therein named", approved May 24, 1879, as amended [815 ILCS 205/0.01 et seq.]; "An Act to promote the welfare of wage-earners by regulating the assignment of wages, and prescribing a penalty for the violation thereof", approved July 1, 1935, as amended [740 ILCS 170/.01 et seq.]; or Part 8 of Article XII of the Code of Civil Procedure, as amended [735 ILCS 5/12-801 et seq.], or of any 2 or more of those Acts, is guilty of an unlawful practice within the meaning of this Act. Nothing in this Section prohibits the prosecution of a person under the Acts specified herein as well as under this Act.

94. Section 2F of the Illinois Consumer Fraud Act, 815 ILCS 505/2F, provides:

Any person who is held in any civil or criminal proceeding to have wilfully and materially violated any Illinois statutory provision regulating the extension of credit to borrowers or designed to protect the consumer purchasing merchandise in a credit, as contrasted from a cash, transaction is guilty of an unlawful practice within the meaning of this Act. Nothing in this Section prohibits the prosecution of a person under the statute violated as well as under this Act.

95. Defendants' noncompliance with MVRISA occurred on more than three occasions per year and was intentional.

96. Section 10a of the Illinois Consumer Fraud Act, 815 ILCS 505/10a, provides in relevant part:

> **(a) Any person who suffers damage as a result of a violation of Sections 2 through 2BB of this Act committed by any other person may bring an action against such person. The court, in its discretion may award actual damages or any other relief which the court deems proper. Proof of a public injury, a pattern, or an effect on consumers generally shall not be required.**
> . . .
> **(c) In any action brought by a person under this Section, the Court may grant injunctive relief where appropriate and may award, in addition to the relief provided in this Section, reasonable attorney's fees and costs to the prevailing party.**

CLASS ALLEGATIONS

97. Pursuant to Fed.R.Civ.P. 23, plaintiff brings this count on behalf of two classes, designated A and B.

98. Class A consists of all persons who satisfy the following criteria:

a. They entered into a automobile transaction.

b. In connection with their automobile transaction, they purchased a service contract or extended warranty.

c. Their transaction was financed by a retail installment contract.

d. Their transaction was documented as a consumer transaction (i.e., TILA disclosures were given).

e. The retail installment contract contains the form of representation set forth in ¶17; i.e., states that an amount was paid to a third party for purchase of an extended warranty or service contract that is other than the amount actually collected by the third party.

99. Class B consists of all persons who satisfy the following criteria:

a. They entered into a automobile transaction.

b. In connection with their automobile transaction, they purchased a service contract or extended warranty.

c. Their transaction was financed by a retail installment contract.

d. Their transaction was documented as a consumer transaction (i.e., TILA disclosures were given).

e. The retail installment contract contains the form of representation set forth in ¶17; i.e., states that an amount was paid to a third party for purchase of an extended warranty or service contract that is other than the amount actually collected by the third party.

f. Guardian is or was a holder of the retail installment contract.

100. For the purpose of this count, the classes include any Illinois resident whose retail installment contract was outstanding within three years of the filing of this action.

101. The classes are so numerous that joinder of all members is impracticable. DeSi and the other dealers that sell transactions to Guardian enter into hundreds of automobile transactions each year, of which a substantial majority are financed and a large proportion involve the purchase of an extended warranty or service contract.

102. There are questions of law or fact common to the class which predominate over any questions affecting only individual members of the class. The common questions of law or fact include the following:

a. Whether the representations complained of constitute an inaccurate disclosure of the itemization of amount financed, and thus violate 12 C.F.R. §226.18.

b. Whether the representations complained of have the tendency or capacity to deceive consumers.

c. Whether defendants are liable for the difference between the money actually paid to a third party for a service contract or extended warranty and the amounts represented to have been paid.

d. Whether defendants' conduct violated MVRISA §18.

e. Whether the violations were willful and material.

103. Plaintiff will fairly and adequately represent the interests of the class members. Plaintiff has suffered pecuniary injuries as a result of defendants' prac-

tices. Plaintiff has retained experienced counsel to prosecute this action. Neither plaintiff nor her counsel have any interests which would lead them not to vigorously prosecute this action.

104. A class action is a superior means for the fair and efficient prosecution of this litigation. Most of the class members are not aware of the wrong or their right to legal redress, making a class action essential. Individual litigation is not economically feasible. At the same time, defendants derive enormous aggregate profits from wrongfully depriving many consumers of amounts ranging from several hundred to several thousand dollars each. In the absence of a class action, this serious wrong will go unredressed.

105. Plaintiff and the class members were damaged, in that:

a. They paid an amount in excess of that actually remitted to the issuers of the service contracts or extended warranties, and were overcharged.

b. They paid and are paying finance charges, collection charges and/or delinquency charges on their retail installment contracts.

106. Defendants' conduct was knowing and wilful and carried out for pecuniary gain, warranting the imposition of substantial punitive damages.

WHEREFORE, plaintiff requests that the Court enter judgment in her favor and in favor of the class members of class A and B and against defendants DeSi and Guardian, respectively, as follows:

a. For compensatory damages.

b. For punitive damages.

c. For an injunction halting the practice complained of.

d. For attorney's fees, litigation expenses and costs.

e. For such other or further relief as the Court deems appropriate.

COUNT IV—ILLINOIS SALES FINANCE AGENCY ACT

107. Plaintiff incorporates ¶¶1-55. This claim is brought against Guardian, only.

108. Guardian is a sales finance agency as defined in 205 ILCS 660/2, in that it is engaged in Illinois in the business of purchasing motor vehicle retail installment contracts or the outstanding balances under such contracts.

109. 205 ILCS 660/8.5 makes it unlawful for a sales finance agency to purchase any motor vehicle retail installment contract with knowledge that the contract violates the Motor Vehicle Retail Installment Sales Act.

110. Guardian purchased the contracts of plaintiff and the class members with knowledge that they failed to comply with the Motor Vehicle Retail Installment Sales Act.

111. 205 ILCS 660/16 provides:

> **An individual who sustains loss as a result of a sales finance agency's violation of this Act may, in a civil action against the sales finance agency, recover damages . . . . the court may allow as an additional part of the recovery, offset or counterclaim, penal damages in an**

amount not more than 25% of the principal amount of the retail contract, retail charge agreement, or evidence of indebtedness which is the subject of the action. In addition, the court may allow that aggrieved individual his reasonable attorney's fees.

CLASS ALLEGATIONS

112. Pursuant to Fed.R.Civ.P. 23, plaintiff brings this count on behalf of a class which consists of all persons who satisfy the following criteria:

a. They entered into a automobile transaction.

b. In connection with their automobile transaction, they purchased a service contract or extended warranty.

c. Their transaction was financed by a retail installment contract.

d. Their transaction was documented as a consumer transaction (i.e., TILA disclosures were given).

e. The retail installment contract contains the form of representation set forth in ¶17; i.e., states that an amount was paid to a third party for purchase of an extended warranty or service contract that is other than the amount actually collected by the third party.

f. Guardian is or was a holder of the retail installment contract.

113. For the purpose of this count, the class includes any Illinois resident whose retail installment

contract was outstanding within five years of the filing of this action.

114. The class is so numerous that joinder of all members is impracticable. DeSi and the other dealers that sell transactions to Guardian enter into hundreds of automobile transactions each year, of which a substantial majority are financed and a large proportion involve the purchase of an extended warranty or service contract.

115. There are questions of law or fact common to the class which predominate over any questions affecting only individual members of the class. The common questions of law or fact include the following:

a. Whether the representations complained of constitute an inaccurate disclosure of the itemization of amount financed, and thus violate 12 C.F.R. §226.18.

b. Whether the representations complained of have the tendency or capacity to deceive consumers.

c. Whether defendants are liable for the difference between the money actually paid to a third party for a service contract or extended warranty and the amounts represented to have been paid.

d. Whether defendants' conduct violated SFAA.

e. Whether the violations were willful and material.

116. Plaintiff will fairly and adequately represent the interests of the class members. Plaintiff has suffered pecuniary injuries as a result of defendants' practices. Plaintiff has retained experienced counsel to prosecute this action. Neither plaintiff nor her counsel

have any interests which would lead them not to vigorously prosecute this action.

117. A class action is a superior means for the fair and efficient prosecution of this litigation. Most of the class members are not aware of the wrong or their right to legal redress, making a class action essential. Individual litigation is not economically feasible. At the same time, defendants derive enormous aggregate profits from wrongfully depriving many consumers of amounts ranging from several hundred to several thousand dollars each. In the absence of a class action, this serious wrong will go unredressed.

118. Plaintiff and the class members suffered loss as a result of Guardian's violation of the Sales Finance Agency Act.

WHEREFORE, plaintiffs request that the Court enter judgment in their favor and in favor of the members of the class and against defendant Guardian as follows:

a. For compensatory and statutory damages.

b. For attorney's fees, litigation expenses and costs.

c. For such other or further relief as the Court deems appropriate.

COUNT V—ILLINOIS CONSUMER FRAUD ACT

119. Plaintiff incorporates ¶¶1-55.

120. Ms. Smith was required to provide a cosigner as a condition to be approved for financing.

121. Ms. Smith had Charlie Williams ("Williams"), her supervisor from work cosign her retail installment contract. Williams is listed as a "co-buyer" (see Exhibit A).

122. Mr. Williams is not the parent or spouse of Ms. Smith.

123. Mr. Williams did not take actual possession of, or use the vehicle at any time.

124. Defendants or auto dealers acting in concert with defendants deceptively and fraudulently misrepresented the status of Mr. Williams and the class members by having them sign as "co-buyers" rather than "guarantors of collectability."

125. Defendants or auto dealers acting in concert with defendants intentionally concealed and suppressed information regarding the status and rights of guarantors by failing to set forth matters required by §18 to be set forth below the signature lines on which they actually signed.

126. Section 24b of MVRISA, 815 ILCS 375/24b, provides:

> **No person who violates this Act, except as a result of an accident or bona fide error of computation, may recover any finance charge, any delinquency or collection charge or any refinance charge in connection with the related retail installment contract.**

127. Guardian nevertheless has collected and is seeking to collect finance charges, delinquency charges and collection charges on the subject transactions.

128. Plaintiff and the class members have paid and are paying finance charges, collection charges and/or

delinquency charges on their retail installment contracts.

129. Section 2 of the Illinois Consumer Fraud Act, 815 ILCS 505/2, provides:

> **[U]nfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act.**

130. Section 2E of the Illinois Consumer Fraud Act, 815 ILCS 505/2E, provides:

> **Any person who is regularly engaged in the business of providing or furnishing merchandise to consumers or in making loans to consumers and who has committed in any calendar year 3 or more violations, as determined in any civil or criminal proceeding, of the "Consumer Finance Act"; the "Consumer Installment Loan Act" [205 ILCS 670/1 et seq.]; the "Retail Installment Sales Act" [815 ILCS 405/1 et seq.]; the "Motor Vehicle Retail Installment Sales Act" [815 ILCS 375/1 et seq.]; "An**

Act to revise the law in relation to the rate of interest and to repeal certain acts therein named", approved May 24, 1879, as amended [815 ILCS 205/0.01 et seq.]; "An Act to promote the welfare of wage-earners by regulating the assignment of wages, and prescribing a penalty for the violation thereof", approved July 1, 1935, as amended [740 ILCS 170/.01 et seq.]; or Part 8 of Article XII of the Code of Civil Procedure, as amended [735 ILCS 5/12-801 et seq.], or of any 2 or more of those Acts, is guilty of an unlawful practice within the meaning of this Act. Nothing in this Section prohibits the prosecution of a person under the Acts specified herein as well as under this Act.

131. Section 2F of the Illinois Consumer Fraud Act, 815 ILCS 505/2F, provides:

Any person who is held in any civil or criminal proceeding to have wilfully and materially violated any Illinois statutory provision regulating the extension of credit to borrowers or designed to protect the consumer purchasing merchandise in a credit, as contrasted from a cash, transaction is guilty of an unlawful practice within the meaning of this Act. Nothing in this Section prohibits the prosecution of a person under the statute violated as well as under this Act.

132. Defendants' noncompliance with MVRISA occurred on more than three occasions per year and was intentional.

133. Section 10a of the Illinois Consumer Fraud Act, 815 ILCS 505/10a, provides in relevant part:

(a) Any person who suffers damage as a result of a violation of Sections 2 through 2BB of this

Act committed by any other person may bring an action against such person. The court, in its discretion may award actual damages or any other relief which the court deems proper. Proof of a public injury, a pattern, or an effect on consumers generally shall not be required.

. . .

(c) In any action brought by a person under this Section, the Court may grant injunctive relief where appropriate and may award, in addition to the relief provided in this Section, reasonable attorney's fees and costs to the prevailing party.

134. These violations involved willful disregard of known legal rights, and were malicious and were committed for pecuniary gain.

CLASS ALLEGATIONS

135. Pursuant to Fed.R.Civ.P. 23, plaintiff brings this count on behalf of a class which consists of all persons who satisfy the following criteria:

a. They entered into a automobile transaction.

b. In connection with their automobile transaction, they purchased a service contract or extended warranty.

c. Their transaction was financed by a retail installment contract.

d. Their transaction was documented as a consumer transaction (i.e., TILA disclosures were given).

e. The retail installment contract contains the form of representation set forth in ¶17; i.e., states that an amount was paid to a third party for purchase of an extended warranty or service contract that is other than the amount actually collected by the third party.

f. Guardian is or was a holder of the retail installment contract.

g. Their transaction is cosigned by a person other than a parent, spouse, or person who actually receives the vehicle.

136. For the purpose of Count V, the class includes any Illinois resident whose retail installment contract was outstanding within five years prior to the filing of this action.

137. The class is so numerous that joinder of all members is impracticable.

138. There are questions of law or fact common to the class which predominate over any questions affecting only individual members of the class. The common questions of law or fact include the following:

a. Whether defendants engage in a practice of having persons who cannot be obligated as cosigners sign contracts as cosigners.

b. Whether the practice complained of constitutes inaccurate disclosures in violation of MVRISA §18.

c. Whether the practice complained of has the tendency or capacity to deceive consumers.

d. Whether the violations were willful and material.

139. Plaintiff will fairly and adequately represent the interests of the class members. Plaintiff has suffered pecuniary injuries as a result of defendants' practices. Plaintiff has retained experienced counsel to prosecute this action. Neither plaintiff nor her counsel have any interests which would lead them not to vigorously prosecute this action.

140. A class action is a superior means for the fair and efficient prosecution of this litigation. Most of the class members are not aware of the wrong or their right to legal redress, making a class action essential. Individual litigation is not economically feasible. At the same time, defendants derive enormous aggregate profits from wrongfully depriving many consumers of amounts ranging from several hundred to several thousand dollars each. In the absence of a class action, this serious wrong will go unredressed.

141. Plaintiff and each member of the class has suffered damage from the violations complained of, in that:

a. They are purportedly obligated on contracts that are not legally enforceable against them.

b. In some cases, they have been forced to pay money on such obligations.

c. They have in some cases been required to expend time and money seeking legal recourse against defendants' actions.

d. In some cases, their credit has been injured.

WHEREFORE, plaintiff requests that the Court grant the following relief to herself and the members of the class and against defendants DeSi and Guardian, respectively, as follows:

e. Appropriate compensatory and punitive damages.

f. An injunction against collection of any finance charges, delinquency or collection charge against plaintiff and the class members.

g. Attorney's fees, litigation expenses, and costs.

h. Such other or further relief as the Court deems appropriate.

COUNT VI—MAGNUSON-MOSS ACT DEFECTIVE AND UNMERCHANTABLE VEHICLE

142. Plaintiff incorporates ¶¶1-55.

143. This count pertains to the plaintiff only.

144. DeSi is a "supplier" within the meaning of Magnuson-Moss.

145. The vehicle sold to plaintiff was a "consumer product" within the meaning of Magnuson-Moss.

146. The vehicle sold to plaintiff by DeSi was defective and unmerchantable for the reasons stated in ¶¶34-37, in violation of implied warranties of merchantability actionable under Magnuson-Moss.

147. Because plaintiff was sold a service contract, any attempted disclaimer of implied warranties is ineffective under 15 U.S.C. §2308.

148. Plaintiff took her car back to DeSi and asked that repairs be made, but DeSi refused and/or failed to do so.

149. Plaintiff is entitled to bring suit for breach of implied warranty under Magnuson-Moss.

WHEREFORE, plaintiff requests that the Court enter judgment in her favor and against DeSi and Guardian respectively as follows:

a. Appropriate damages.

b. Attorney's fees, litigation expenses and costs.

c. Such other or further relief as the Court may deem appropriate.

COUNT VII—UNIFORM COMMERCIAL CODE DEFECTIVE AND UNMERCHANTABLE VEHICLE

150. Plaintiffs incorporate ¶¶1-55.

151. This count pertains to the plaintiff only.

152. The vehicle sold to plaintiff by DeSi was defective and unmerchantable for the reasons stated in ¶¶34-37, in violation of §2-314 of the Uniform Commercial Code, 810 ILCS §2-314.

153. Plaintiff took her car back to DeSi and asked that repairs be made, but DeSi refused and/or failed to do so.

154. Because plaintiff was sold a service contract, any attempted disclaimer of implied warranties is ineffective under 15 U.S.C. §2308.

WHEREFORE, plaintiff requests that the Court enter judgment in her favor and against DeSi and Guardian respectively as follows:

a. Appropriate actual and statutory damages.

b. Costs.

c. Such other or further relief as the Court may deem appropriate.

COUNT VIII—TRUTH IN LENDING ACT

155. Plaintiffs incorporate ¶¶1-55.

156. This count pertains to the plaintiff only.

157. DeSi violated 12 C.F.R. §226.18 by filling in the retail installment contract with an incorrect down payment and basing other numbers on the incorrect down payment.

WHEREFORE, plaintiff requests that the Court enter judgment in her favor and against DeSi and Guardian respectively as follows:

a. $1000.

b. Attorney's fees, litigation expenses, and costs.

c. Such other or further relief as the Court may deem appropriate.

/s/_____
Daniel A. Edelman

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JURY DEMAND

Plaintiff demands trial by jury.

/s/_____
Daniel A. Edelman

FILED
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No. 98-853

In The

Supreme Court of the United States

October Term, 1998

JERRY TAYLOR and MARY TAYLOR,

Petitioners,

v.

QUALITY HYUNDAI, INC., BANK ONE MILWAUKEE, N.A., and BANK ONE CHICAGO, N.A.,

Respondents.

and

DAVITA M. SMITH,

Petitioner,

v.

DESI AUTO SALES, INC., and GUARDIAN NATIONAL ACCEPTANCE CORP.

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS BANK ONE MILWAUKEE AND BANK ONE CHICAGO

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ISSUES PRESENTED

1. Whether the 1980 Amendment to the Truth In Lending Act (barring any civil action for violation of the Truth In Lending Act against an assignee of a creditor unless the violation for which such action or proceeding is brought is apparent on the face of the documents assigned) trumps the Federal Trade Commission's Holder Notice (1975) under which the assignee would have taken subject to any claims and defenses that the debtors could have asserted against the original sellers?

2. Whether the Seventh Circuit properly construed the standard for determining whether a violation is "apparent on the face" of the contract under 15 U.S.C. § 1641(a) of the Truth In Lending Act when it held that § 1641(a) does not require assignees to investigate the assignor's business practices?

CERTIFICATE OF INTEREST AND CORPORATE DISCLOSURE STATEMENT

The undersigned, as counsel of record for Respondents Bank One, Illinois, N.A., f/k/a Bank One Chicago, N.A., and Bank One, Wisconsin f/k/a Bank One, Milwaukee, N.A., ("Bank One") furnishes the following list in compliance with Supreme Court Rule 29.6:

1. Respondent Bank One, Milwaukee, N.A., merged with Bank One, Wisconsin on December 7, 1996, and is now named Bank One, Wisconsin.

2. Respondent Bank One, Chicago, N.A., merged with Bank One, Illinois, N.A., on February 15, 1997, and is now named Bank One, Illinois, N.A.

3. Bank One, Wisconsin's parent company is Bank One Corporation, f/k/a Banc One Corporation. Banc One merged with First Chicago NBD on October 2, 1998, and is now named Bank One Corporation.

4. Bank One, Illinois's parent company is Banc One Illinois Corporation.

5. Bank One Corporation is a publicly held company owning 10% or more of the stock in the aforementioned parties.

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16 C.F.R. Section 433.2(a) (1987)..... *passim*

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BRIEF IN OPPOSITION

Respondents, Bank One, Milwaukee, N.A., and Bank One, Chicago, N.A., (collectively "Bank One") respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Seventh Circuit's opinion in this case. The Seventh Circuit's opinion is reported at 150 F.3d 689 (1998). Petitioner's Appendix 1.

STATEMENT OF THE CASE

Petitioners bought a car and an extended service warranty from Quality Hyundai; the Loan was then assigned to Bank One. Petitioners brought suit against the auto dealer and Bank One claiming violations of The Truth In Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.* Bank One moved to dismiss because TILA § 1641(a) exempts assignees like Bank One from TILA liability unless the violation is "apparent on the face" of the documents assigned. The District Court dismissed Bank One and a Seventh Circuit panel unanimously affirmed.

The Seventh Circuit held that TILA § 1641(a) exempts assignees from liability under TILA, notwithstanding the Federal Trade Commission ("FTC") Holder Notice set forth in 16 C.F.R. Section 433.2(a) (1987) ("FTC Holder Notice"). The Seventh Circuit ruled that the Holder Notice does not govern TILA-based claims against assignees. The Seventh Circuit found that the Holder Notice is part of the contract by force of law and must be read in light of other laws that modify its reach (§ 1641(a)). *Taylor,* 150 F.3d at 693 (Pet. App. 6-7). In addition, the Seventh Circuit held that the requirement of

§ 1641(a) that the violation not be "apparent on the face" of the assigned documents does not impose a duty of additional inquiry on assignees. Only a violation that a reasonable person could spot on the face of the disclosure statement or other assigned documents would make the assignee liable under TILA. Since no such violation existed, the Seventh Circuit affirmed the dismissal of Bank One from this case. *Taylor*, 150 F.3d at 694-95 (Pet. App. 8-9).

Petitioners now seek review in this Court.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THERE IS NO CONFLICT OVER THE ISSUES PRESENTED IN THE PETITION

The Seventh Circuit Court of Appeals quite properly ruled that when a conflict may exist between a federal statute enacted by Congress and a federal regulation promulgated by the Federal Trade Commission, the statute rules. Therefore, the exemption of § 1641(a) controls over the FTC Holder Notice and assignees are not liable under TILA unless the violation is apparent on the face of the documents assigned. *Taylor*, 150 F.3d at 693, 695. Every federal court that has addressed this issue has reached that conclusion. *See, e.g., Ellis v. GMAC*, No. 97-6963, 1998 U.S. App. LEXIS 28456 (11th Cir. 1998); *Taylor v. Bob O'Connor Ford Inc.*, No. 97 C 0720, 1998 WL

177689 at *9-11 (N.D. Ill. April 13, 1998);[1] *Brister v. All Star Chevrolet, Inc.*, 986 F. Supp. 1003, 1009-10 (E.D. La. 1997); *Kinzel v. Southview Chevrolet Company*, 892 F. Supp. 1211, 1217 (D. Minn. 1995); *Ritter v. Durand Chevrolet, Inc.*, 932 F. Supp. 32 (D. Mass. 1996); *Turner v. II Diamond Motors, Inc.*, CA. No. 96-336-B-MI (M.D. La. July 14, 1997);[2] *Smith v. Highland Park*, 915 F. Supp. 281 (N.D. Ala. 1996); and *Van Vels v. Premier Athletic Center*, No. 1:97-CV-665, 1998 U.S. Dist. LEXIS 10993 (W.D. Mi. 1998). There is no conflict between the Circuit Courts of Appeals, between the Circuit Courts of Appeals and the District Courts, or between the District Courts. Certiorari is therefore not warranted.

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[1] *Taylor v. Bob O'Connor* (Gottschall, J.) is just one of several different decisions in the Northern District of Illinois ruling in this manner. In addition to Judge Holderman's decision in the *Smith v. Guardian National Accepting Corp.*, case consolidated here, *see Alexander v. Continental Motor Werks*, No. 95 C 5828, 1996 U.S. Dist. LEXIS 1849 (N.D. Ill. 1996) (Kocoras, J.); *Bambilla v. Evanston Nissan*, Nos. 96 C 6818, 94 C 2748, 1996 U.S. Dist. LEXIS 7029 (N.D. Ill. 1996) (Leinenweber, J.); *McPhan v. Geo. R. Gibson Chevrolet*, No. 95 C 6077, 1996 U.S. Dist. LEXIS 17678 (N.D. Ill. 1996) (Nordberg, J.); *Furge v. Evergreen Finance Co.*, No. 97 C 5176, 1998 U.S. Dist. LEXIS 16557 (N.D. Ill. 1998) (Marovich, J.); *Young v. Ford Motor Co.*, No. 97 C 4824, 1998 U.S. Dist. LEXIS 15376 (N.D. Ill. 1998) (Manning, J.); *Mount v. Bank Lakeview*, No. 92 C 5645, 1998 U.S. Dist. LEXIS 10252 (N.D. Ill. 1998) (Norgle, J.); and *Cemail v. Viking Dodge, Inc.*, 982 F. Supp. 1296 (N.D. Ill. 1997) (Moran, J.).

[2] *See also Green v. Lewis Motors, Inc.*, 994 F. Supp. 735 (M.D. La. 1997).

II. THE ISSUES OF ASSIGNEE LIABILITY UNDER TILA HAVE NOT RECEIVED SUFFICIENT ATTENTION IN THE LOWER COURTS TO WARRANT GRANTING A WRIT OF CERTIORARI

The issues raised in the Supreme Court were issues of first impression before any Federal Court of Appeals. *Taylor*, 150 F.3d at 693 (Pet. App. 5). Only two Courts of Appeals – the Seventh Circuit in *Taylor* and, most recently the Eleventh Circuit in *Ellis*, 1998 U.S. App. LEXIS 28456 (11th Cir. 1998) – have ruled on these issues.[3] The paucity of published opinions, and the consistency of those opinions, both indicate this case does not warrant a writ of certiorari.

III. THE ISSUES OF ASSIGNEE LIABILITY UNDER TILA ARE NOT OF SUFFICIENT IMPORTANCE TO WARRANT GRANTING A WRIT OF CERTIORARI

A. The FTC, Whenever It Chooses, May Modify Its Holder Rule To Conform To The Language Of § 1641(a)

Petitioners urge the United States Supreme Court to resolve the perceived conflict between the federal statute and the federal regulation. But the purported problem posed was not created by the Seventh Circuit's opinion, which correctly states that the statute trumps the regulation; it is created by the FTC's failure to act and make their regulation consistent with the congressional mandate as set forth in § 1641(a). Any inconsistency between

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[3] *See* citations above.

the FTC's Holder Rule and § 1641(a) is a result of the FTC's inaction in the wake of the amendment to that statute. The FTC at any time can modify the language of its rule to conform with the current state of the law, if it determines such action is necessary. Neither this Court, nor any other court, is obligated to make this executive determination for the FTC.

B. The Lower Court's Decision Does Not Deprive Petitioners Of A Remedy For Their Purported Injury

Although Petitioners contend that "millions" of people will be affected by the Seventh Circuit's decision, they fail to mention that the lower court's ruling does not deprive them of a remedy under TILA. Although it is true that, consistent with the language of § 1641(a), Petitioners may not hold the Bank as assignee responsible for their alleged injury, Petitioners still may pursue the seller of their car for relief under TILA. In light of the absence of any conflict between circuits, this continuing right to sue the seller obviates the need for a writ of certiorari.

IV. THE SEVENTH CIRCUIT'S OPINION CORRECTLY RESOLVES THE ISSUES RAISED IN THE PETITION

The Seventh Circuit correctly framed the issues presented and correctly decided the questions of law. Because the Seventh Circuit got it right, a writ of certiorari is not warranted.

A. Petitioners Frame The Issues In A Manner That Renders Congress Subservient To The Federal Trade Commission

What the petitioners are seeking in this case is a rule from this Court that states that the proverbial tail (the Federal Trade Commission and its regulation) wags the dog (Congress and its legislation). While the petitioners cast this question in terms of their belief that Congress would not or could not have enacted such an amendment if it intended to contradict the provisions of millions of consumer credit contracts, such a position leads inevitably to a ruling that neither the Courts nor Congress can contradict FTC regulations – a position no Federal Court has ever accepted.

Petitioners' beliefs as to Congress' intent in enacting the 1980 Amendment to the assignee provisions of the TILA (15 U.S.C. § 1641(a)) are unsupported by any legislative history. Their beliefs also are contradicted by the fact that Congress was made aware of the effect of the Amendments (exempting assignees from TILA liability).

First, Petitioners cite no legislative history in support of their belief that "Congress would not or could not have enacted such an amendment," (Pet. at 8), if it intended the result held by the Seventh Circuit. The legislative history, however, demonstrates that Congress did specifically intend to narrow the scope of assignee liability. *See* H.R. Conf. Rep. No. 96-842 at 80-81 (1980), *reprinted in* U.S.C.C.A.N. 298, 310-11; S. Rep. No. 96-368 at 32-33 (1979), *reprinted in* 1980 U.S.C.C.A.N. 280, 296. The Amendment, which specifically removed provisions

allowing assignee liability for "knowledge", further supports the Congressional intent as found by the Seventh Circuit.

Second, Petitioners' argument that Congress "could not or would not" is refuted by the fact that one speaker, Mr. Hobbs, in arguing against the amendment, specifically forecast the result found by the Seventh Circuit:

> This section [proposed § 1641(a)] removes assignee liability for violations known to the assignee which are not apparent on the face of the transferred documents . . . If the assignee knows that the amount financed contains overcharges, the assignee is not liable and has no incentive to guard against the overcharge as long as the overcharge is disguised so as not to be apparent on the face if the instruments . . .

Hearing before the Committee on Banking, Housing and Urban Affairs, United States Senate, 96th Congress, February 2, 1979, at 42.

Petitioners also speculate that perhaps Congress and the FTC thought there was no conflict between § 1641(a) and the FTC Holder Rule – there is no support for this position, either. The fact is Congress enacted an unambiguous exclusion for assignees; it was up to the regulators to conform their regulations to the statute, if they felt it was important to do so. Perhaps the regulators were concerned, as was Congress, that TILA forms already were providing too much information, and needed simplification rather than further complication. *See, e.g.*, S. Rep. No. 96-368 at 16 (1979), *reprinted in* 1980 U.S.C.C.A.N. 252; S. Rep. No. 96-73 at 2 (1979), *reprinted*

in 1980 U.S.C.C.A.N. 280. Of course, this too is speculation. What is not speculation is the following: (1) the FTC can resolve the conflict at any time by modifying the regulation to conform to the law as set forth in the statute, and (2) the statute enacted by Congress clearly and unambiguously exempts Bank One from liability in this case. This is exactly how the Seventh Circuit ruled.

Section 1641(a) is unambiguous. It focuses attention on the disclosure documents required by TILA. It does not require an assignee to investigate the business practices of the assignee or consider generalizations about the assignee's industry before it accepts the assignment. Section 1641(a) obligates an assignee to scrutinize the relevant documents for obvious deviations from the technical requirements of TILA. If there are none on the face of the documents, the assignee's duties are discharged and it may accept the assignment without fear of TILA liability. Petitioners can offer nothing, either in terms of the language of the law or the legislative history, to refute this analysis.

B. Petitioners Attempt To Rewrite The Law To Graft A Subjective Test Onto The Objective "Apparent-On-The-Face" Standard Of § 1641(a)

Petitioners incorrectly claim that the Seventh Circuit "fabricated" the standard for determining whether a violation is apparent on the face of the contract. Pet. 11. The Seventh Circuit properly read the statutory language, and applied analogous banking law standards to explain that "apparent on its face" means just that – the violation must be recognizable from a review of the disclosure

statement and other documents assigned and nothing else. Petitioners seek to graft a subjective component onto a test Congress intended to be objective. The court below, recognized, however, that to do so would rewrite the relevant legislation. This Court should reject Petitioners' efforts to substitute their judgment for that of Congress.

C. The "Apparent-On-The-Face" Standard Of TILA § 1641(a) Is Unambiguous

Petitioners' second issue boils down to simple statutory construction – Petitioners do not like the construction given to the statue by every federal court that has addressed the issue. Petitioners' disagreement, however, does not justify this Court's intervention:

> where a federal statute's language is unequivocal, the courts are simply to apply it rather than consult legislative history or agency interpretations

Van Vels, 1998 U.S. Dist. LEXIS 10993, at *14 (applying § 1641(a)) citing *Chevron, U.S.A. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842, 104 S. Ct. 2778 (1984). The Seventh Circuit did just that; this Court should let the decision of the lower court stand.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 98-853

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JERRY TAYLOR and MARY TAYLOR,

Petitioners,

vs.

QUALITY HYUNDAI, INC., BANK ONE MILWAUKEE, N.A. and BANK ONE CHICAGO, N.A.,

Respondents,

-and-

DAVITA M. SMITH,

Petitioner,

vs.

DESI AUTO SALES, INC. and GUARDIAN NATIONAL ACCEPTANCE CORP.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT GUARDIAN NATIONAL ACCEPTANCE CORP.

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QUESTIONS PRESENTED FOR REVIEW

I. The Truth in Lending Act provides that assignees of retail installment contracts may be liable for TILA disclosure violations only when the violation is "apparent on the face of the disclosure statement" and other documents assigned to them. Have all appellate courts to have considered the issue, including the Seventh Circuit below, and now the Eleventh Circuit, correctly rejected Petitioners' claim that assignee liability may be based on assignees' subjective knowledge of industry practices, rather than on what is objectively apparent on the face of the documents assigned?

II. By administrative rule, the Federal Trade Commission has long required a notice in all consumer contracts dealing generally with debtors' rights against holders of the contracts. Have all appellate courts to have considered the issue correctly decided that, in the TILA context, the statute's specific provision regarding assignee liability must be given effect over the generalized notice required by the FTC?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the undersigned, counsel of record for Respondent Guardian National Acceptance Corp., states that Guardian National has no parent companies and no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

A. The Actual Issue before the Court

In their Petition for Writ of Certiorari, Petitioners Jerry and Mary Taylor and Davita M. Smith have framed the issues backwards, obscuring the question answered by the Seventh Circuit against them.[1] That question is a narrow one concerning the liability of assignees like Respondent Guardian National Acceptance Corp. under 15 U.S.C. § 1641(a) of the Truth in Lending Act. Does the statute's objective test, limiting an assignee's liability for a creditor's TILA violation to cases in which "the violation . . . is apparent on the face of the disclosure statement," mean what it says, or is there is an unstated subjective component to the test that requires a court to inquire into the subjective knowledge of assignees gleaned from their supposed knowledge of industry practices? The Seventh Circuit below, the Eleventh Circuit subsequently, and almost every district court that has considered the issue has agreed with Respondents' contention that the test is purely objective.

These courts also dismissed Petitioners' contention that the statute is in effect overridden by the Federal Trade Commission's "holder" notice, 16 C.F.R. § 433.2. Petitioners address the holder notice issue first, and devote most of their argument to it, attempting to escape what the courts have found crystal clear — that it is the statute, not the regulation, which determines assignee liability.

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1. The decision below is reported as *Taylor v. Quality Hyundai, Inc.*, at 150 F.3d 689. It is provided in the Appendix to Smith's Petition ("App.") and is referred to here as "App. __." The Petition concerns two cases which were consolidated for decision before the Seventh Circuit. *Taylor v. Quality Hyundai, Inc., et al.* (assignee Bank One) was decided by District Judge Norgle and *Smith v. DeSi Auto Sales et al.* was decided by District Judge Holderman. This brief is the response to the Petition of Guardian National Acceptance Corp., assignee in *Smith*.

B. Smith's Misstatement of Her Complaint

Smith bought a used car from DeSi. At the same time she bought an extended service contract ("ESC") for her car. The TILA disclosure statement showed a payment of $799 for "E.S.C." under "Amounts Paid to Others for You." App. 47 (Smith's Complaint, ¶47). But Smith's statement of purported fact in the Petition does not parallel her Complaint allegation. In the Petition, Smith alleges:

> DeSi **falsely represented** on the face of the retail installment contracts that they paid the *entire price* of the petitioners' extended warranties to the providers" . . . [but] in fact . . . DeSi **retained a significant portion of the price of the extended warranties as pure profit** and paid only a *fraction* of the price to the warranty providers.

Petition 4 (italicized emphasis in original; bolded emphasis supplied). In the Complaint, however, Smith did not explicitly allege a "false" representation or retention of part of the price as "pure profit;" she alleged only "DeSi did not pay the sum of $799 to the issuer of the extended service contract/warranty," "paid a small portion of the service contract fee to the warranty issuer" and "retained the balance of the charge," and made no more specific allegation. App. 47-48 (Smith's Complaint, ¶¶19, 21a and 21b).

The Petition also fails to acknowledge that, if DeSi retained part of the $799, the amount is unknown, precisely because the disclosure statement and other sales documents provided no basis for determining it. The face of the documents show only that DeSi paid $799 to the ESC provider.

Smith also alleged, at least in her Petition, that "the dealer **systematically charged** more for extended warranties to credit

customers than it charged to cash customers," contending this alleged practice violates TILA because the "extra markup for credit customers is a finance charge that must be disclosed as such." Petition 4 (emphasis supplied). In the Complaint, Smith's allegation was more limited, however: "DeSi and Dealers do not charge the same amount in cash and credit transactions for the same extended warranty or service contract [sic] **in all cases**." App. 50 (Complaint, ¶37, emphasis supplied).[2] Regardless of the frequency of the practice as alleged by Smith, there was no evidence in the record as to the practice at all.

Moreover, Smith nowhere alleges Guardian knew whether DeSi charged more for extended service contracts to credit customers than it did to cash customers. The only allegation in the complaint as to this practice is as to DeSi and Smith has never suggested any reason why Guardian should know anything about DeSi's practices with **cash** customers. Accordingly, as to Guardian, the hidden finance charge claim should not be presented in the Petition at all. Only the claim of inaccurate itemization pertains to Guardian.

C. Petitioners' Not Very Apparent Theory of the Case

Until the very last page of the Petition, Petitioners do not even refer to their theory of how assignees of retail installment contracts like Guardian might be liable under the statute, which states unequivocally that assignees are liable only for violations apparent on the face of the assigned documents. 15 U.S.C.

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2. In her brief in the Seventh Circuit, Smith's allegation on this point was different yet again. There she contended flatly that "DeSi charges more for service contracts or extended warranties in credit transactions than it does in comparable cash transactions." Smith Seventh Circuit Opening Brief at 5. Thus, Smith has variously alleged that the practice occurs in some cases (Complaint), in all cases (Seventh Circuit) and "systematically" (here).

§ 1641(a). That theory was revealed in Smith's Complaint, where Smith asserted Guardian "knew" DeSi retained a portion of the $799 it charged her "from its extensive experience in financing used car transactions [and] actual knowledge of the amounts which car dealers disbursed to the issuers of extended warranties." App. 55 (Smith's Complaint, ¶52).

Smith thus personified Guardian in alleging actual knowledge, treating the corporation as though it were a person. Smith never attempted, however, to allege that specific Guardian employees, including any employees who might have seen Smith's retail installment contract as it was being processed, had any "actual knowledge" of the discrepancy between what was shown on the TILA statement and what portion allegedly was remitted to extended warranty issuers.[3]

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3. In the Petition, even Smith's limited reference to her theory is overstated and disingenuous. In finally stating Smith's theory — "Ms. Smith's complaint alleges that Guardian had actual knowledge that a large percentage of the $799 was retained by the dealer as profit" (Petition 12, citing App. 55-56), Smith fails to disclose that the "actual knowledge" of Guardian she alleged was not in fact any "actual" knowledge as to her transaction, but instead what Guardian is alleged to have gleaned "from its extensive experience in financing used car transactions." App. 55 (Smith's Complaint, ¶52). And, again, in the Complaint, Smith did not allege that Guardian retained a "large percentage" of the $799 "as profit;" she said instead only that that "$799 was not paid to the issuer. . . ." App. 47 (Smith's Complaint, ¶19).

REASONS FOR DENYING THE WRIT

I.

THE FEDERAL CIRCUITS THAT HAVE CONSIDERED THE ISSUE AGREE THAT ASSIGNEES LIKE GUARDIAN ARE NOT LIABLE UNDER TILA BECAUSE THE DEALERS' POSSIBLE VIOLATIONS WERE NOT APPARENT ON THE FACE OF THE ASSIGNED PAPERS.

Gibson v. Bob Watson Chevrolet-Geo, Inc., 112 F.3d 283 (7th Cir. 1997) concerned the car dealer's TILA liability for the practice of including but not disclosing extended warranty upcharges as "amounts paid to others" on TILA disclosure statements. In *Gibson*, the Seventh Circuit held that the car dealer, the buyer's "creditor" in TILA parlance, may have violated TILA in two respects. 112 F.3d at 284. First, if it charged the buyer more for the extended service contract than it would have charged a cash customer, the undisclosed markup might be a hidden finance charge. *Id.* at 284-285. Second, if it listed as an "amount paid to others" on the TILA disclosure statement a larger number than the amount it actually paid to the provider of the extended service contract, it may be guilty of inaccurate itemization. *Id.* at 285.

As Petitioners acknowledge, however, the "question here is whether the petitioners can also hold the **assignees** liable for the TILA violations." Petition 4 (emphasis supplied). That question must be decided under the Truth in Lending Act, as amended:

> Except as otherwise specifically provided in this title, any civil action for a violation of this title or proceeding under section 108 which may be brought against a creditor may be maintained against any assignee of such creditor **only if the violation for**

> **which such action or proceeding is brought is apparent on the face of the disclosure statement,** except where the assignment was involuntary.

15 U.S.C. § 1641(a). The statute then includes a sentence to help explain the meaning of "apparent on the face of the disclosure statement:"

> For the purpose of this section, a violation apparent on the face of the disclosure statement includes, but is not limited to (1) a disclosure which can be determined to be incomplete or inaccurate from the face of the disclosure statement or other documents assigned, or (2) a disclosure which does not use the terms required to be used by this title.

Id.

At the time of the Seventh Circuit decision (July 20, 1998), almost every district court concurred with Guardian's position that claims against assignees may be based only on objective violations — those "apparent" on the face of the contract — and cannot be based on a subjective test directed at knowledge. App. 5.[4] The Eleventh Circuit has since concurred. *Ellis v.*

4. The Seventh Circuit noted the following district court opinions: *Taylor v. Bob O'Connor Ford, Inc.*, 1998 WL 177689 (N.D. Ill. 1998); *Brister v. All Star Chevrolet, Inc.*, 986 F. Supp. 1003 (E.D. La. 1997); *Kinzel v. Southview Chevrolet Co.*, 892 F. Supp. 1211, 1217 (D. Minn. 1995). App. 5. *See Ritter v. Durand Chevrolet, Inc.*, 932 F. Supp. 32 (D. Mass. 1996) (assignee BayBank dismissed from TILA count). Other unreported decisions in the Northern District of Illinois include *McPhan v. Geo R. Gibson Chevrolet, Inc.*, 1996 WL 685449 (N.D. Ill. Nov. 25, 1996) (assignee National City Bank, Indiana dismissed from case); *Lindsey v. Ed Johnson Oldsmobile, Inc.*, 1996 WL 411336 (N.D. Ill. (Cont'd)

General Motors Acceptance Corporation, 160 F.3d 703, 709 (11th Cir. 1998). Before a 1980 amendment, assignees could be liable for TILA violations based on their "knowledge" of the violation,[5] so "the amendment therefore narrowed considerably the potential scope of assignee liability." App. 5.[6]

The Seventh Circuit, the Eleventh Circuit and almost all district courts have rejected the gloss Smith would have the

(Cont'd)
July 19, 1996), *reconsideration denied* 1996 WL 529417 (Sept. 13, 1996) (assignee Chicago Acceptance Corp. dismissed from case); *Gray v. Sunstar Acceptance Corp.*, No. 96 C 186 (N.D. Ill. June 17, 1996) (assignee Sunstar Acceptance Corp. dismissed from case); *Alexander v. Continental Motor Werks, Inc.*, 1996 WL 79403 (N.D. Ill. Feb. 15, 1996), *reconsideration denied* May 7, 1996 (assignee Eagle Finance Corp. dismissed from case).

5. Originally, Section 1641 did have a subjective component:

> [I]n any action or proceeding by or against any subsequent assignee of the original creditor **without knowledge to the contrary by the assignee** when he acquires the obligation, written acknowledgment of receipt by a person to whom a statement is required to be given pursuant to this subchapter shall be conclusive proof of the delivery thereof and, unless the violation is apparent on the face of the statement, of compliance with this part.

(Emphasis supplied). Congress reformed TILA in 1980 and, among other changes, removed the phrase "without knowledge to the contrary by the assignee" from § 1641(a).

6. The Seventh Circuit cited H.R. Conf. Rep. No. 96-842, at 80-81 (1980), *reprinted in* 1980 U.S.C.A.N. 298, 310-11 and S. Rep. No. 96-368, at 32-33 (1979), *reprinted in* 1980 U.S.C.A.N. 280, 296 for this conclusion. App. 5.

Court impose on the statute, which would require inquiry into the assignee's knowledge of the creditor's (seller's) industry. Smith's entire position is that Guardian has "knowledge to the contrary" of the disclosure statement's representation that $799 was paid to the provider of the extended warranty. But Congress removed that phrase from § 1641(a) in 1980 and the Seventh Circuit and the other courts have correctly deferred to that legislative decision.

In contending the Seventh Circuit "fabricated its own standard" for determining when a violation is "apparent on the face of the contract," Petition 11, Petitioners do not shrink from distorting and exaggerating their own claims to this Court, as discussed above. Again, they contend they

> alleged that the holders in this case, Bank One and Guardian, *knew* that the figures in the boxes labeled "amounts paid to others" on petitioners' contracts were false. For example, Ms. Smith's complaint alleges that Guardian had actual knowledge that a large percentage of the $799 was retained by the dealer as profit.

Petition 11-12, citing App. 55-56. But in her Complaint, at "App. 55-56," Smith's allegation of what Guardian "knew," and what Guardian's "actual knowledge" was, was much weaker and less specific. The Complaint merely alleged general knowledge of industry practices "from [Guardian's] extensive experience in financing used car transactions [and] actual knowledge of the amounts which car dealers disbursed to the issuers of extended warranties." App. 55 (Smith's Complaint, ¶52).[7]

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7. The difference between the petition and the specific complaint allegation as to the $799 is pointed out at page 2 above.

Perhaps Smith does not reveal the source of Guardian's alleged "knowledge" to this Court because her substantiation of such knowledge before the Seventh Circuit was so lame. She relied there on a flat assertion that the practice is "well known in the automobile financing industry," citing as support a New York attorney general report based on 1989 data report from car manufacturers. Smith's Seventh Circuit Opening Brief at 17.

Although her Petition disingenuously suggests Guardian "knew" about her specific retail installment contract, it was instead from her premise that Guardian knew about industry practice that Smith simply inferred Guardian therefore knew DeSi did not pay $799 to the provider of Smith's extended warranty: "[I]t is apparent on the face of a Retail Installment Contract stating that a large amount is disclosed to a third party that the statement is inaccurate." Smith's Seventh Circuit Opening Brief at 19. Stated otherwise, Smith told the Seventh Circuit that every time a Guardian employee receives a retail installment contract and disclosure statement, Guardian "knows" the amount stated for any extended warranty is inaccurate if it is "a large amount."

The Seventh Circuit wisely rejected this sophistry:

> Even though we do not assume that assignees approach their tasks with blank minds, we cannot agree that awareness of the practices of some creditors can be equated to knowledge that a particular disclosure on a particular TILA form is inaccurate or incomplete. These are good cases in point. Suppose that 75%, or even 90%, of all automobile dealers in the greater Chicago area engage in the practice about which the plaintiffs are complaining. That still does not mean that an

> employee of a bank or other financial institution could tell, simply by looking at the face of the documents assigned, whether the particular TILA statement before her was inaccurate or incomplete. One out of four, one out of ten, might be perfectly accurate. In effect, the rule for which the plaintiffs are arguing would impose a duty of inquiry on financial institutions that serve as assignees. Yet this is the very kind of duty that the statute precludes, by limiting the required inquiry to defects that can be ascertained from the face of the documents themselves.

App. 8-9.[8]

Ellis, supra involved virtually the same issues and the Eleventh Circuit followed the Seventh Circuit. The Ellises' retail installment contract, assigned to GMAC, listed an amount paid to "Mechanic" for an extended warranty and the Ellises claimed that only a small part of the listed amount was paid to "Mechanic," with the rest retained by the Ellises' dealer. The Eleventh Circuit, like the Seventh Circuit, refused to speculate about GMAC's subjective actual knowledge, focusing instead on what was objectively apparent on the face of the disclosure statement. *Id.* at 709. The Eleventh Circuit agreed that TILA

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8. In this passage, the Seventh Circuit also implicitly recognized the burden Smith's subjective test would impose on assignees like Guardian. Smith's test, in any industry where it can be alleged that all or most sellers engage in a practice possibly actionable under TILA, would leave assignees like Guardian two choices: (1) police and reform all sellers with whom it deals; or (2) stop lending in that industry. But this cannot be what Congress intended when it rewrote Section 1641 in 1980. The change in Section 1641(a) signaled to lenders that they need **not** continually audit their assignors' every practice. And certainly Congress was not trying to make it impossible for all but the wealthy to buy a car.

does not "impose a duty of inquiry on financial institutions that serve as assignees." *Id.*[9]

Smith's contention that the Seventh Circuit created a standard for apparent violations that "does not exist" (Petition at 12) is fanciful, as demonstrated by the very legislative history Smith quotes in the Petition. In the first place, the Seventh Circuit itself quoted the statute's definition of "apparent" violations. App. 8, quoting 15 U.S.C. § 1641(a) (quoted at 6 above). Smith quotes legislative history to virtually the same effect. Petition 11. Smith fails to explain how the holding of the Seventh Circuit "contravenes" those definitions, particularly when the Seventh Circuit held that assignees may be liable under Section 1641(a) for "violations that a reasonable person can spot on the face of the disclosure statement or other assigned documents." Petition 11, quoting App. 9.

In conclusion, under the statute, assignee liability can only be based on whatever appears on the face of the assigned documents. There was no "apparent" violation on the Smith contract assigned to Guardian. The Seventh Circuit correctly held, therefore, that Guardian could not be liable to Smith. App. 9.

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9. The Eleventh Circuit's analysis brings to mind Judge Wood's comparison to letter to credit law for the Seventh Circuit in the decision below.

> A useful analogy is the duty of banks to review documents presented under a letter of credit. Like an assignee bank reviewing a TILA statement, a bank reviewing a letter of credit is responsible for noticing facial irregularities such as statements that are illegal, impossible, or in conflict with other terms. . . . [citation]. But in neither instance does the bank have a duty to seek out additional information before it makes its own decision to accept the tender of the documents, or to accept the assignment with the protection afforded by § 1641(a).

App. 9.

II.

FTC-REQUIRED LANGUAGE THAT IS PART OF A CONTRACT BY FORCE OF LAW MUST BE READ IN LIGHT OF OTHER LAWS MODIFYING ITS REACH AND THE SEVENTH CIRCUIT CORRECTLY HARMONIZED THE REGULATION WITH THE STATUTE.

Petitioners' highly truncated discussion of Section 1641(a) does not appear until the very end of the Petition. Petitioners focus instead on a regulation issued by the Federal Trade Commission which predated the amendment of the statute expressly limiting assignee liability. This is no accident, for it permits Smith to ignore the fundamental proposition, recognized by all appellate courts to have considered the issue, that, to the limited extent the statute and the regulation are inconsistent, the statute must prevail. App. 5; *Ellis, supra*, 160 F.3d at 709.

The 1980 Amendment to Section 1641(a) was passed five years after the FTC required in a regulation that a notice concerning holder liability must appear on all consumer contracts. That notice appeared on DeSi's retail installment contract with Smith, as assigned to Guardian:

> ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF.

16 C.F.R. § 433.2 (the "Holder Notice"), Petition 6.

Simply, as the Seventh Circuit found, the Holder Notice "is not the last word on this subject." App. 4. At the time of the Seventh Circuit's decision, almost "every district court has agreed" with Guardian's position that "the unmistakable effect of the 1980 amendment is to trump the FTC's Holder Notice." App. 5. The Eleventh Circuit has now agreed as well. 160 F.3d at 709.

The Seventh Circuit rejected Smith's contention below (but not referred to in the Petition) that, by accepting the assignments containing the Holder Notice, Guardian somehow "waived" its defense under Section 1641(a). App. 6; *accord, Ellis*, 160 F.3d at 709 ("the only evidence of GMAC's purported intent to relinquish TILA's protections is the language that the FTC mandates be inserted into every consumer contract"). Further, the court found that the statutory amendment did not rob the Holder Notice of its utility as to claims against assignees:

> As a legally required part of every consumer financing contract, the Holder Notice continues to perform an important function even in the contracts between the plaintiffs and their respective assignees. If the cars they purchased turn out to be lemons and they assert a right to withhold payment against the sellers, they may also assert the same right against the assignees.

App. 6; *accord, Ellis*, 160 F.3d at 709, citing the Seventh Circuit ("the provision continues to fill a valuable role by reiterating the right of buyers to withhold payment from sellers or assignees, if the cars they purchased turned out to be lemons").

The Seventh Circuit saw the flaws in Smith's alternate contention below that Section 1641(a) and the Holder Notice do not conflict (Petition 8) because Congress did not provide

in the statute that assignees were exempt from FTC regulations (such as the Holder Notice) and the FTC itself has not amended the Holder Notice since the statute was amended.

> Neither of these points is persuasive. There is no reason for Congress expressly to address regulatory language that will become (in part) superseded by subsequent legislation; it is the responsibility of the agency to confirm its rules to any pertinent new laws. *Cf. United States v. Larionoff*, 431 U.S. 864, 873 & n. 12 (1977). As for the lack of change in the rule, we have already noted that the Holder Notice continues to allow the debtor to raise many claims and defenses against the assignee that he or she may have against the original seller; § 1641(a) limits only certain TILA claims.

App. 7.

The Seventh Circuit also easily rejected Smith's contention that Section 1641(a) limits only direct claims against the assignee that may be asserted without the procedural and damages limitations in actions against the dealer, as provided in 15 U.S.C. § 1640. Petition 9-10.

> The problem with this argument is straightforward: nothing in §1641 supports it. Section 1641 applies to "any civil action for violation of this subchapter" (of which both §1640 and 1641 are a part), which surely encompasses actions that implicate the procedural and damages rules of §1640.

App. 7.

Petitioners suggest that, "[u]nder the Seventh Circuit's opinion . . . Congress has promulgated a statute that *forces parties to include false statements on private contracts.*" Petition 5 (emphasis in original). This needlessly dramatic hyperbole is spurious for at least two reasons. First, the Holder Notice is not "included" by the parties to the contract in the sense that they include agreed-upon terms and conditions. As the Seventh Circuit held, the Holder Notice,

> even though contained within the contract, was not the subject of bargaining between the parties, and indeed could not have been. It is part of the contract by force of law, and it must be read in light of other laws that modify its reach.

App. 6-7, *citing, inter alia, Robbins v. Bentsen*, 41 F.3d 1195, 1198 (7th Cir. 1994); *accord, Ellis*, 160 F.3d at 709.

Secondly, when rule-required text is inconsistent with a statute, the statute must prevail, but that does not render the required text "false."[10] Far from being false, "[t]he Holder

10. *Robbins, supra* involved a difference in language between Title VII and an EEOC regulation pertaining to the time for filing suit against the government after administrative determination of a discrimination charge. The statute provided that a party must file suit against the government within 90 days after receipt of the notice of "final action" taken by the agency or 180 days after filing the charge if the party was aggrieved by the "final disposition." The EEOC had provided in regulations that the suit could be filed 90 or 180 days after receipt of a "final decision" and defined that term as including findings on the merits on all issues raised. Plaintiff had received a notice terminating the processing of her charge but no decision on the merits, so she contended she had not received the "final decision" (the regulation language) triggering the beginning of the limitations period. The Seventh Circuit held, however, that plaintiff had received the "final action" and "final disposition" referred to in the statute; the regulation's requirement of (Cont'd)

Notice continues to perform an important function even in the contracts between the plaintiffs and their respective assignees." App. 6, citing examples.

As the Seventh Circuit suggested, if the FTC perceives a conflict between the Holder Notice and Section 1641(a) as amended, it should modify the Holder Notice to conform with the statute. App. 7. In the meantime, the lower courts have struck the right balance with respect to the interplay of Section 1641(a) and the FTC's Holder Notice.

III.

CONCLUSION: THERE ARE NO REASONS FOR GRANTING THE WRIT.

The two circuits that have considered the issues presented by the Petition are in agreement. Their holdings are straightforward. Congress meant what it said. Having amended Section 1641(a) to provide that assignees could be liable for violations "only if the violation . . . is apparent on the face of the disclosure statement," a court may not infer that liability could be based on what a subjective inquiry into assignee knowledge of seller practices — Petitioners' theory of liability — might reveal.

Further, the circuits followed the inarguable rule that statutes control over inconsistent regulatory requirements and satisfactorily harmonized the two in these cases. Petitioners' efforts to obscure the issues presented by this case notwithstanding, the issues are simple ones correctly decided by the lower courts. Petitioners have failed to demonstrate any of the traditional grounds for granting certiorari.

(Cont'd)
findings on the merits were not the only "final action" triggering the time period. *Id.* at 1198. This did not render the regulation's provisions or the information the regulation gave to the putative plaintiff "false;" they were instead merely unenforceable to the extent they were in conflict with the statute's provisions.

CONCLUSION

Respondent Guardian National Acceptance Corp. respectfully requests that the Petition be denied.

Respectfully submitted,

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